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ALEXANDER L. STEVAS,
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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1983

REUVEN TAKO and JACKIE TAKO, his wife,
Petitioners,

vs.

MAYER AND CIE, a German corporation,
and MAYER ROTHKOPF INDUSTRIES, INC.,
a foreign corporation

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE THIRD DISTRICT

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QUESTION PRESENTED

Whether a state court decision contrary to the clear wording of the rule of procedure applicable to relation back of amendments and contrary to prior decisions of the same court and that court's state Supreme Court and which is totally unsupported by the record is so fundamentally unfair as to violate the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States of America.

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MAYER AND CIE, a German corporation,
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a foreign corporation

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE THIRD DISTRICT

Reuven Tako and Jackie Tako, his wife, by and through undersigned counsel, petition for a writ of certiorari to review the judgement of the District Court of Appeal of Florida for the Third District in this case, and further pray that this Court summarily reverse that judgement.

OPINIONS BELOW

The opinion of the District Court of Appeal from which this petition for certiorari is taken (App. A, *infra*), is reported at 437 So.2d 686. The opinion of the Circuit Court is not reported; its order, entering Summary Judgment for defendants, is set forth in Appendix F, *infra*.

The opinion of the District Court of Appeal as to the earlier interlocutory appeal is reported at 388 So.2d 1092 and is additionally set forth in Appendix K, *infra*.

JURISDICTION

The judgement of the District Court of Appeal of Florida (App. D, *infra*) was entered 21 June 1983. A petition for rehearing (App. C, *infra*) was denied on 12 September 1983 (App. B, *infra*). The jurisdiction of this court is invoked under 28 U.S.C. 1257(3), inasmuch as the judgement of the District Court of Appeal has infringed rights and privileges claimed under the Constitution of the United States.

CONSTITUTIONAL, STATUTORY, AND PROCEDURAL PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Florida Rule of Civil Procedure 1.050 provides:

> Every action of a civil nature shall be deemed commenced when the complaint or petition is filed except that ancillary proceedings shall be deemed commenced when the writ is issued or the pleading set forth the claim of the party initiating the action is filed.

3. Florida Rule of Civil Procedure 1.190(c) provides:

> Relation Back of Amendments. When the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading.

4. Florida Statute §95.11(3) provides, in pertinent part:

> Actions other than for the recovery of real property shall be commenced as follows:
>
> * * * *
>
> (3) Within four years.—
>
> (a) an action founded on negligence
>
> * * * *
>
> (e) an action for injury to a person founded on the design, manufacture,

distribution, or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures.

* * * *

STATEMENT OF THE CASE

1. Material Facts.

This is a product liability suit arising from a serious personal injury that occurred on 27 October 1975. The original complaint, based on theories of negligence, breach of implied warranty, and strict liability in tort, was filed on 29 August 1977, as indicated by the index to the record on appeal (at the state court level). (App. E, *infra*) The Third Amended Complaint (App. M, *infra*) was filed on 14 December 1978 (see App. E, *infra*) nearly a year prior to the expiration of the statute of limitations.[1] This complaint properly corrected previous misnomers such that all defendants were properly named, including the respondents to this petition, and service upon them effectuated or attempted. The lower tribunal quashed service on Mayer and Cie and Mayer Rothkopf Industries, Inc. (App. L, *infra*) An interlocutory appeal was taken by the Tako's and the District Court of Appeal affirmed. (App. K, *infra*)

The litigation continued as to the other parties, and on 18 January 1982, the Takos filed their Fourth Amended Complaint (App. J, *infra*) which made new

[1] §95.11(3), Florida Statutes.

jurisdictional allegations as to Mayer and Cie and Mayer Rothkopf Industries, Inc., but alleged no new theories of liability or damages, and therefore claimed no new cause of action. The claim asserted in this Fourth Amended Complaint arose out of the occurrence set forth in the previously filed complaints. Defendants again attacked jurisdiction, but the lower tribunal ruled against them.

All defendants except Mayer and Cie and Mayer Rothkopf Industries, Inc. were subsequently dismissed, either voluntarily or by judgement which the Takos chose not to appeal.

The only remaining Defendants, Mayer and Cie and Mayer Rothkopf Industries, Inc., moved for summary judgement based upon the four year statute of limitations, using the novel but incorrect argument that the statute of limitations had run because "jurisdiction had not attached" within the 4 year period provided by the statute of limitations. (App. H, *infra*) After a hearing (App. G, infra) the lower tribunal granted the motion, and entered the summary final judgement. (App. F, *infra*)

An appeal to the District Court of Appeal of Florida for the Third District was taken. The appellate court affirmed in a per curium decision without opinion or citation. (App. D, *infra*) A timely motion for rehearing (App. C, *infra*) was denied 12 September 1983 (App. B, *infra*), similarly without opinion or citation.

Writ of certiori directed to that judgement is prayed for.

additionally to the rights of due process afforded thereunder.[4]

It is impossible to determine whether the federal question was passed upon by the appellate court inasmuch as no opinion or citation was expressed by that court.

REASONS FOR GRANTING THE PETITION

Reuven Tako and Jackie Tako, his wife, petitioners here, by the rulings of the state courts, have been so denied fundamental fairness as to deny them equal protection and due process of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This case presents an important question of federal law, not yet passed on by this Court[5] but which should be settled by this Court, concerning substantial constitutionally protected rights of all civil litigants in state and federal court when the "relation back" doctrine

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[4]The jurisdictional requisites were far more clearly raised in this case than they were in *Vachon vs. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974), in which a majority of this court found the jurisdictional requisites sufficiently satisfied.

[5]Although this court has not yet ruled on the federal question presented, it has repeatedly recognized that an amendment which sets up the same cause of action as the original pleading is not barred by the running of the limitation in the meantime. see, e.g. *Texas P. Ry. Co. v. Cox*, 145 U.S. 593, 12 S.Ct. 905, 36 L.Ed. 829 (1892); *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 53 S.Ct. 278, 77 L.Ed. 619 (1933). In that regard the judgement below is in direct conflict with prior decisions of this court.

is involved. This question is equally applicable to litigants in Federal courts and all State courts whose laws and procedural rules provide for relation back and further provide that filing of a complaint or petition tolls the running of the statute of limitations.

1. The Federal Question Was Adequately and Timely Raised.

Petitioners adequately raised the Federal question. Although the Federal question was perhaps less than articulately set forth, the required clear intendment is present and as such is sufficient, as

> No particular form of words or phases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

New York ex rel. Bryant vs. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928); *Street vs. New York*, 394 U.S. 576, 584, 89 S.Ct. 1354, 1361-1362, L.Ed.2d 572 (1969).

These criteria having been met, the claim is to be regarded as having been adequately presented.

Petitioners raised the Federal question at their earliest reasonable opportunity. There was no requirement that it be raised at the trial court, inasmuch as petitioners do not challenge the validity of the statute of limitations or Florida Rule of Civil Procedure, but rather only the application of that statute and rule. Further, it was not necessary for petitioner to raise the Federal question initially on appeal, for reasons stated below. Although it is well settled that, generally, it is too late to raise a question by petition for rehearing to the State Appellate Court, *Herndon vs. Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935), such is not true where the decision of that court has unexpectedly given rise to a Federal question that the party seeking review, as petitioner here, has had no previous opportunity to assert and could not fairly have anticipated. *Missouri ex rel. Missouri Insurance Company vs. Gehner*, 281 U.S. 313, 50 S.Ct. 326, 74 L.Ed. 870 (1930). In an opinion citing *Gehner, supra*, Mr. Justice Brandeis in the court's opinion of *Brinkerhoff-Faris Trust & Savings Company vs. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) recognized that a Federal question raised for the first time upon motion for rehearing was timely when, as here, the petitioner could not reasonably have anticipated a court to apply a new construction to a rule or law, which was entirely contrary to that court's previous construction. In that opinion, Mr. Justice Brandeis stated

> The plaintiff seasonably filed a petition for rehearing [with the Appellate Court] in which it recited the . . . facts and asserted, in addition to its claims on the merits, that, in applying the new construction of [the applicable rule or

> statute] and in refusing relief because of the [new interpretation], the court transgressed the due process clause of the Fourteenth Amendment. The additional federal claim was thus made timely, since it was raised at the first opportunity.
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> * * *
>
> . . . [The] violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The Federal guarantee of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branches of government.

Brinkerhoff-Faris Trust & Savings Company vs. Hill, 281 U.S. 673, 677-678, 50 S.Ct. 451, 453, 74 L.Ed. 1107, 1111-1112 (1930).

As this court has stated in *Herndon vs. Georgia*, *supra*, "The whole point, therefore, is whether the ruling should have been anticipated."

In the instant case, the Federal question was raised when it was for precisely those reasons deemed acceptable in *Brinkerhoff-Faris Trust & Savings Company vs. Hill*, *supra*. The District Court of Appeal for the Third District of Florida, as well as its Supreme Court of Florida, has

consistently and without exception[6], held that an amended civil pleading relates back to the time of original filing, at least when no new parties were named and no new cause of action was claimed[7]. *Foss vs. Mansell*, 378 So.2d 802 (Fla. 3rd DCA 1979); *In re Wood's Estate*, 271 So.2d 42 (Fla. 3rd DCA 1972), certiorari discharged, adopted by Florida Supreme Court 278 So.2d 614; *In re Grist's Estate*, 83 So.2d 860 (Fla. 1956); *Griffin vs. Workman*, 73 So.2d 844 (Fla. 1954).

As a consequence of and in reliance on the long settled rule in Florida that if no new cause of action is set up in an amendment to a civil complaint or petition, that amendment relates back to the date of filing of the original complaint in which the parties were named, petitioners had no reasonable or fair expectation that the court would give the applicable rule a totally new construction. As this court stated in *Missouri ex rel Missouri Insurance Co. vs. Gehner, supra*, "[i]t may not reasonably be held that the [petitioners were] bound to

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[6]Since at least 1954 when the rule of procedure regarding relation back of amendments was enacted in substantially its current wording.

[7]The Fourth Amended Complaint was brought against only parties named in the previously filed Third Amended Complaint, and the Fourth Amended Complaint contained no new cause of action or claim of remedy thereunder, but materially differed from the Third Amended Complaint only in its jurisdictional allegations. Because Mayer and Cie and Mayer Rothkopf Industries, Inc. were named in the Third Amended Complaint, the Third Amended Complaint is the "original pleading" for the purpose of relation back with regard to this petition. Hence, the date it was filed, 14 December 1978, is the date of "original filing" with regard to this petition.

anticipate such a construction or in advance to invoke federal protection. . .".

Accordingly, petitioners raised the Federal question at the earliest opportunity in accordance with the exception to the general rule as previously discussed.

Therefore, the Federal question was adequately and timely raised.

2. There is No Independent and Adequate State Ground to Support the Judgment.

There is no independent and adequate state ground to support the state court decision so as to preclude review by this court.

This case involves a question of application of state law and the effects by that application upon the substantial constitutional rights of equal protection and due process provided by the Fourteenth Amendment to the United States Constitution. Petitioners recognize that, save in exceptional circumstances, the United States Supreme Court must accept as controlling a decision of the state courts on questions of local law, both statutory and common. *American Ry. Express Company vs. Commonwealth of Kentucky*, 273 U.S. 269, 47 S.Ct. 353, 71 L.Ed. 639 (1927). However, when, as here, the application of state law amounts to a mere arbitrary or capricious exercise of power, or is in clear conflict with fundamental principles, established for protection and enforcement of private rights, the Supreme Court may properly interfere. *American Ry. Express*

Company vs. Commonwealth of Kentucky, supra, and cases cited therein.

In the case at bar, there is absolutely nothing in the record which supports the decision of the state court determination on state grounds as being other than arbitrary and capricious and accordingly, though independent, such state grounds are clearly not adequate. Because the decision on the federal question cannot be determined from the decision without opinion, and because the outcome is in clear conflict with fundamental principles established for the protection and enforcement of private rights, which rights have here been grossly violated, this court may properly and, it is suggested, should take jurisdiction to vindicate the federal rights.

As stated by this court,

> Where there is a federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgement was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgement, this court will take jurisdiciton of the case, because, when put to inference as to what points the state court decided, we ought not to assume that it proceeded on ground clearly untenable. *Johnson vs. Risk*, 137 U.S. 300, 11 S.Ct. 111, 113, 34 L.Ed. 683.

Additionally, this court may properly take jurisdiction in accordance with *Henry vs. State of Mississippi*, 379

U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965) wherein this court said:

> When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail.
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> * * *
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> Whether the right was denied or not given due recognition by the [state court]s
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> * * *
>
> is a question as to which the plaintiffs are entitled to invoke our judgement.

Henry vs. State of Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965) citing *Love vs. Griffith*, 266 U.S. 32, 33-34, 45 S.Ct. 12, 69 L.Ed. 157.

3. **Substantial Federal Rights of Petitioners have been Violated**

The public importance and far-reaching effects of the Fourteenth Amendment are clear. The "equal protection of the laws" provisions of the State and Federal Constitutions require that the rules of procedure and laws generally, apply equally to all litigants. *Connell vs. Sledge*, 306 So.2d 194 (Fla. 1st DCA 1975). Any litigant to whom those rules are clearly not applied equally will have had his or her equal protection rights violated.

In the instant case, the petitioners were deprived of equal protection as guaranteed by the Fourteenth Amendment to the Constitution of the United States in that the applicable rule of civil procedure which provides for relation back of amendments was not applied by the state courts, in an unprecedented judicial interpretation of the particular rule, which was also contrary to prior decisions regarding the Federal counterpart of that rule.

The Florida Rule of Civil Procedure which deals with the relation back of amendments, Florida Rule of Civil Procedure 1.190(c), is essentially identical to the pertinent portion of Rule 15 of the Federal Rules of Procedure. In fact, "[Florida Rule of Civil Procedure 1.190(c)] is patterned closely after Federal Rule 15. . . . " Authors Comment, Florida Statutes Annotated, Rules, Volume 30 (1967).

Florida Rule of Civil Procedure 1.190(c) provides:

> Relation back of amendments. When the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading.

Likewise, Federal Rule of Civil Procedure 15(c) provides in pertinent part:

> Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction,

or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

* * *

The virtual identity is apparent. It should be noted that the rules are exceptionally unambiguous and clear. Additionally, the mandatory nature of the relation back is expressed in the Florida counterpart by the use of the word "shall".

It has long been the law in Florida that Florida courts will look to Federal court interpretation of Federal laws when Florida laws are essentially the same, as here. This proposition has been expressed by the District Court of Appeal to which this petition asks writ of certiorari be issued in *Door-Oliver, Inc. vs. Linder Industrial Machinery Company*, 263 So.2d 239 (Fla. 3d DCA 1972) and by the Supreme Court of Florida in its *En Banc* decision in *Savage vs. Rowell Distributing Corp.*, 95 So.2d 415 (Fla. 1957), as well as other Florida courts.

Because no Florida courts of record have decided the issue of the relation back of amendments which deal only with allegations pertaining to personal jurisdiction[8] it is necessary, under Florida law, to look to Federal court decisions pertaining to that aspect of the rule.

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[8]It is suggested that the wording of the rules, both state and federal, with regard to relation back of amendments, is so clear that appellate decision with regard to personal jurisdiction is only rarely necessary.

The Federal decisions regarding this point are unanimous in their holdings. "Amendments curing a defective statement of . . . personal jurisdiction will relate back since they do not violate the standard prescribed by the rule." Wright & Miller, Federal Practice and Procedure §97, West Publishing Company (1971) citing *MacGowan vs. Barber*, 127 F.2d 458 (2d Cir. 1942); *Kane vs. Central American Mining & Oil, Inc.*, 235 F.Supp. 559 (S.D.N.Y. 1964). See also *Burnstein vs. Columbia Broadcasting System, Inc.*, 291 F.2d 8 (7th Cir. 1961).

As stated, there are no reported Florida State court decisions dealing directly with amendments curing defective personal jurisdiction allegations. However, the decisions are legion and unanimous in permitting relation back of amendments curing defects when the amendment made a claim or defense which arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. See, e.g., *Livingston vs. Malever*, 103 Fla. 200, 137 So. 113 (Fla. 1931); *Griffin vs. Workman*, 73 So.2d 844 (Fla. 1954); *Ake vs. Birnbaum*, 25 So.2d 213 (Fla. 1946).

Although there is nothing unconstitutional about the pertinent rule of civil procedure, nor is there anything claimed to be unconstitutional about the four year statute of limitations[9] it is the application[10] of the rule of

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[9]Section 95.11(3), Florida Statutes.

[10]Review by this court is proper on certiorari when, as here, there is an erroneous exercise of authority under a valid statute or rule. *Hanson vs. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958).

procedure controlling the relation back of amendments which was done in an unconstitutional manner. The decision of the state court could not ground its decision on some peculiarity of Florida law. The decision when viewed in light of the facts surrounding the case, and the dates and substance of the pleadings and motions and answers directed thereto, and orders of court, is completely without basis in law or fact.

It is suggested that the state court decision in this case is not unlike the state court decision in *Thompson vs. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed. 2d 654 (1960), in which case this court unanimously reversed the decision of the state court.[11] In that case, the ultimate question presented to the court was whether the charges against the petitioner were so totally devoid of evidenciary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. As pointed out by Mr. Justice Black, the decision on that question turned not on the sufficiency of the evidence, but on whether the decision rested upon any evidence at all. *Thompson vs. City of Louisville, supra.* The court in that case determined that there was in fact no evidence supporting the decision of the state court.

The situation is similar in this case in that the record is completely devoid of any evidence at all to support the decision of the state court. The Third

[11]Notwithstanding that *Thompson vs. City of Louisville* is a criminal case involving a conviction whereas the instant case is a civil case involving a judgment in favor of defendant, petitioners suggest as discussed more fully above, that the basic premise is applicable to both cases.

Amended Complaint, filed against the respondents here, was never dismissed by any court. Only the service of process, and hence personal jurisdiction, was quashed by order of court, which order was upheld on appeal. The opinion of the District Court of Appeal which upheld the trial court's quashing of service of process states that "[t]his is an appeal by the Takos, the plaintiffs below, from a non-final order quashing service of process on Mayer Rothkopf Industries, Inc. and Mayer and Cie". *Tako vs. Mayer Rothkopf Industries, Inc.*, 388 So.2d 1092 (Fla. 3rd DCA 1980) (App. K, *infra*)

However, that order in no way terminated the tolling of the statute of limitations inasmuch as Florida law, like Federal law, provides that the statute of limitations is tolled upon the filing of an action, and such tolling is without regard to the issuance of summons or service upon the defendant(s) or the effectiveness of such service. *Klosenski vs. Flaherty*, 116 So.2d 767 (Fla. 1960); *Dibbele vs. Jensen*, 129 So.2d 162 (Fla.3rd DCA 1961); *Pratt vs. Durkop*, 356 So.2d 1278 (Fla.2d DCA 1978); Corpus Juris Secundum, Federal Civil Procedure, §3, §331 *et seq.*, Fla. R.C.P. 1.050.

Petitioners followed all appropriate procedure in a timely fashion and yet their right to a cause of action has suffered an outcome so bizarre as to have been patently and fundamentally unfair. It cannot reasonably be said that the petitioners have had the laws of their state equally applied to them, nor that the state action has been consistent with fundamental principles of justice.

the laws, wrongfully deprived petitioners of their constitutionally guaranteed rights of equal protection and due process in a manner so as to make a mockery of the Fourteenth Amendment to the Constitution of the United States.

In summary, the record is utterly devoid of support for the decision of the state court and is contrary to the clear wording of the rule and to prior decisions of that court and the Florida Supreme Court. As such, there is no adequate and independent state ground which will operate so as to preclude review by this court. The injustice and lack of fundamental fairness is so substantial as to violate the equal protection and due process guaranties provided by the Fourteenth Amendment to the Constitution of the United States. The question of equal protection and due process under state and federal procedural laws dealing with relation back of amendments is a substantial federal question not yet ruled on by this court[12] but which should be ruled on by this court.

The record being totally devoid of support for the judgement below, it is respectfully suggested that this is one of those rare cases in which plenary consideration is unnecessary and this court may properly summarily reverse the judgement below, and petitioners so pray that this Honorable Court issue writ of certiorari and summarily reverse the judgement below.

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[12]See footnote number 5, *supra*.

CONCLUSION

For the reasons set forth above the petition for certiorari should be granted and it is prayed that the writ of certiorari be issued and the judgement below summarily reversed.

Respectfully submitted,

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David M. Verizzo
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December 1983

Appendix A

686 FLA. 437 SOUTHERN REPORTER, 2D SERIES

DISTRICT COURTS OF APPEAL

THIRD DISTRICT

Title	Docket Number	*Date	Disposition	**Appeal from and Citation
	• •	•		
Sundale Associates, Ltd. v. Southeast Bank, N.A.	83-705	9/12/83	App. dism.	Cir.Ct. (Dade)
Sweeting v. State	82-2114	8/23/83	Aff.	Cir.Ct. (Dade)
	• •	•		
Tako v. Mayer and Cie	82-2030	9/13/83	Aff.	Cir.Ct. (Dade)
	• •	•		
Travelers of Rhode Island v. Denker	83-1337	7/28/83	App. dism.	Cir.Ct. (Dade)
Trueba v. Pawley	83-18	9/26/83	Aff.	Cir.Ct. (Dade)
	• •	•		

Appendix B

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1983

MONDAY, SEPTEMBER 12, 1983

REUVEN RAKO and JACKIE TAKO,

Appellants,

vs.

MAYER AND CIE and MAYER,
ROTHKOPF INDUSTRIES, INC.,

Appellees.

CASE NO. 82-2030

Upon consideration, appellant's motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By /s/ [illegible]
Deputy Clerk

cc: Gerald E. Rosser
Joe N. Unger
Welsh & Telander
/srb

Appendix C

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

REUVEN TAKO and JACKIE TAKO,

Appellants,

vs.

MAYER AND CIE and MAYER
ROTHKOPF INDUSTRIES, INC.,

Appellees.

CASE NO. 82-2030

MOTION FOR REHEARING OR FOR REHEARING EN BANC

Appellants file this motion for rehearing or for rehearing en banc and say:

1. The order of this Court, affirming the decision below without opinion overlooks or masapprehends the prior law, and the momentous change that the decision represents in terms of prior law, and also the trap for the unwary that is created by the lack of opinion.

2. As noted by Appellants in their brief and argument, and not reargued here, the rule in Florida

has long been that, for purposes of the statute of limitations, an amended complaint relates back to the prior complaint, so long as an entirely new and different cause of action is not alleged. In addition to the authorities previously cited, the attention of the Court is invited to *Meltsner v. Aetna Cas. & Insur. Co.*, 177 So.2d 43 (Fla. 3d DCA 1965), cert. den. 184 So.2d 886.

3. If this Court intends that an exception to the prior law exist where the timely complaint did not contain sufficient jurisdictional allegations as to a non-resident defendant, then that decision, which conflicts with prior decisions containing no such exception, should not be rendered without an opinion, inasmuch as Appellants herein are thus derived of the opportunity to seek review of the decision in the Florida Supreme Court. A pronouncement on this point is needed so that litigants throughout the State may receive uniform treatment and be aware of this exception to the relation back doctrine (a certified question would also suit the purpose).

4. Alternatively, Appellants seek a rehearing en banc pursuant to Rule 9.331 Fla.R.App.P. on the ground that such a proceeding is necessary to maintain uniformity in the Court's decisions. Although no opinion was written in the instant case, such is not necessary for the assertion of intra-district conflict. *Puga v. Suave Shoe Corp.*, 417 So.2d 678 (Fla.3d DCA 1982).

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of this court and that a consideration by the

full court is necessary to maintain uniformity of decisions in this court:

Meltsner v. Aetna Cas. & Insur. Co., 177 So.2d 43 (Fla.3d DCA 1965) cet. den. 184 So.2d 886.

WHEREFORE, Appellants respectfully pray that the Court grant a rehearing and reverse its prior decision in this case, or write an opinion acknowledging the conflict with prior decisional law in other districts and the Florida Supreme Court (or certify the question), or grant a rehearing en banc.

I HEREBY CERTIFY that a true copy of this motion was mailed on June 27, 1983, to: JOE N. UNGER, P.A., 606 Concord Building, 66 W. Flagler Street, Miami, Florida 33130; and WELSH & TELANDER, P.A., 1492 S. Miami Avenue, Miami, Florida 33130.

GERALD E. ROSSER, ESQ.
Suite 412, Biscayne Bldg.
19 W. Flagler St.
Miami, Florida 33130
Telephone: 305 371-7220

By: /s/ GERALD E. ROSSER
Gerald E. Rosser

Appendix D

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1983

REUVEN TAKO and JACKIE TAKO,

Appellants,

vs.

MAYER AND CIE and MAYER,
ROTHKOPF INDUSTRIES, INC.,

Appellees.

CASE NO. 82-2030

Opinion filed June 21, 1983

An Appeal from the Circuit Court for Dade County, Rhea Pincus Grossman, Judge.

Gerald E. Rosser, for appellants.

Joe N. Unger; Welsh & Telander, for appellees.

Before BARKDULL, HUBBART and PEARSON, DANIEL, JJ.

PER CURIAM.

Affirmed.

Appendix E

Richard P. Brinker
CLERK
CIRCUIT AND COUNTY COURTS
Dade County Courthouse

APPELLATE SECTION

NOVEMBER 2, 1982

GENERAL JURISDICTION DIVISION
73 WEST FLAGLER STREET
Miami, Florida 33130
Telephone (305) 579-5936

GERALD E. ROSSER, ESQ.
12th FLOOR
155 SOUTH MIAMI AVENUE
MIAMI, FLA. 33130

RE: REUVEN AND JACKIE TAKO VS
MAYER AND CIE AND MAYER, ETC.
CIRCUIT NO. 77-2364
DISTRICT NO. 82-2030

DEAR sir;

For your convenience, I am enclosing a copy of the Index and Clerk's Certificate in the above styled cause, Re: the Original Record-on Appeal to the d c a.

Sincerely,

RICHARD P. BRINKER
Clerk, Circuit Court
in and for Dade County, Florida

by /s/ Lola H. Cunier
Deputy Clerk

RPB: lhc
Enc: (1)
cc: RICHARD M. WELSH, ESQ.

c: Joe N. Unger, Esq
1/10/83

DISTRICT COURT OF APPEAL

THIRD DISTRICT

REUVEN TAKO and JACKIE TAKO,

Appellants,

VS.

MAYER and CIE and MAYER ROTHKOPF INDUSTRIES, INC.,

Appellees.

ORIGINAL RECORD ON APPEAL FROM THE CIRCUIT COURT OF DADE COUNTY, FLORIDA
CIVIL ACTION CASE NO. 77-2364
DISTRICT COURT NO. 82-2030

GERALD E. ROSSER, ESQ.
12th Floor
155 South Miami Avenue
Miami, FLA. 33130

Attorneys for Appellants

RICHARD M. WELSH, ESQ.
1492 South Miami Avenue
Miami, FLA. 33130

Attorney for Appellees

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	CLERK'S NOTE:	
JAN. 14, 1980	TRANSCRIPT OF TESTIMONY taken on January 14, 1980, is bound and paginated separately and transmitted under separate cover embracing pages 1 to 30, comprising VOLUME III	
	Certified copy of the following instrument transmitted to District Court is numbered to coincide with the original.	
SEP. 23, 1982	FINAL SUMMARY JUDGMENT	358

STATE OF FLORIDA)

COUNTY OF DADE)

I, RICHARD P. BRINKER, Clerk, Circuit and County Courts in and for Dade County Florida, DO HEREBY CERTIFY that the foregoing pages numbered 358 to ____ inclusive contain a true and correct copy (copies) of the Order(s) appealed numbered to coincide with the original papers filed in the case of REUVEN TAKO, et ux, Plaintiffs, against MAYER AND CIE, etc., et al., Defendants, Civil Action Case No. 77-23642, being as follows, to wit:

> FINAL SUMMARY JUDGMENT filed on SEP. 23, 1982 and duly Recorded SEP. 29, 1982 in Official Record Book No. 11566, at page 358

according to the records and files of my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 29th day of October A.D., 1982.

RICHARD P. BRINKER
Clerk Circuit and County Courts,
in and for Dade County, Florida

By _____
Deputy Clerk

STATE OF FLORIDA)

COUNTY OF DADE)

I, RICHARD P. BRINKER, Clerk, Circuit and County Courts in and for Dade County Florida, DO HEREBY CERTIFY that the foregoing pages numbered 1 to 358 inclusive, contain a true and correct recital and inclusion of such papers and proceedings in the case of REUVEN TAKO, et ux, Plaintiffs, against MAYER AND CIE, etc., et al., Defendants, Civil Action Case No. 77-23642, as appear from the records and files of my office that have been directed to be included in said record.

(Pages 358 to —, inclusive, embrace certified copy (copies) of the Order(s) appealed to be retained by the District Court.)

IN WITNESS WHEREOF, I have hereunto set may hand and affixed the Seal of said Court this 29th day of October A.D., 1982.

RICHARD P. BRINKER
Clerk Circuit and County Courts,
in and for Dade County, Florida

By _____
Deputy Clerk

STATE OF FLORIDA)
)
COUNTY OF DADE)

I, RICHARD P. BRINKER, Clerk of the Circuit and County Courts in and for the County of Dade, State of Florida, DO HEREBY CERTIFY that the enclosed Exhibits are the Plaintiffs', and Defendants' Exhibits marked January 3, 1980, being as follows, to wit:

JAN. 3, 1980

PLAINTIFFS' EXHIBITS

1:
Various brochures from MAYER & CIE, etc.

2:
Copy of letter dated February 8, 1979 to MAYER and CIE from DAVID H. GOLD and letter dated March 14, 1979 to DAVID H. GOLD from MAYER, ROTHKOPF INDUSTRIES, INC., together with Presentation Folder, Brochure and fabric samples,

as reflected by the Clerk's file stamps appearing thereon in the case of REUVEN TAKO, et ux, Plaintiffs, against MAYER AND CIE, etc., et al., Defendants, Civil Action Case No. 77-23642, according to the records and files of this Office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 29th day of October, A.D. 1982.

RICHARD P. BRINKER
Clerk Circuit and County Courts,
in and for Dsde County, Florida

By _____
Deputy Clerk

Appendix F

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 77-23642 (CA 14)

REUVEN TAKO and JACKIE TAKO, his wife,
Plaintiffs,

vs.

MAYER AND CIE, a German corporation, and MAYER, ROTHKOPF INDUSTRIES, INC., a foreign corporation,
Defendants.

FINAL SUMMARY JUDGMENT

THIS CAUSE having come on to be heard September 7, 1982, upon Defendants', MAYER and CIE and MAYER, ROTHKOPF INDUSTRIES, INC.'S Motion for Summary Final Judgment, the court having heard argument of counsel and being otherwise fully advised in the premises, it is thereupon

ORDERED AND ADJUDGED:

1. That Final Summary Judgment on behalf of the Defendants, MAYER and CIE, and MAYER, ROTHKOPF INDUSTRIES, INC. is hereby entered.

Appendix G

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 77-23642 CA 14

REUVEN TAKO, et ux.,

Plaintiffs,

v.

MAYER and CIE, et al.,

Defendants.

Dade County Courthouse
Miami, Florida
Tuesday, September 7, 1982

The above-entitled cause came on for hearing before the Honorable Rhea Pincus Grossman, judge of the above-styled Court, in her office at the Dade County Courthouse, on Tuesday, September 7, 1982, at 11:00 a.m., pursuant to Notice.

APPEARANCES:

HENRY T. COURTNEY, ESQ., and
DAVID VERIZZO, ESQ., of the
Law Offices of Henry T. Courtney,
on behalf of the Plaintiffs.

GERALD E. ROSSER, ESQ., of the
Law Offices of Gerald E. Rosser,
on behalf of the Plaintiffs.

BRUCE TELANDER, ESQ., of the
Law Offices of Richard M. Welsh, P.A.,
on behalf of the Defendants.

THE COURT: State your appearances, for the record.

MR. TELANDER: May it please the Court, my name is Bruce Telander, from the Law Firm of Richard M. Welsh, representing the Defendant Mayer and Cie, and Defendant Mayer Rothkopf Industries, Inc.

MR. COURTNEY: Henry Courtney, on behalf of the plaintiff, with my associate, Mr. Verizzo, and my lead counsel here, Gerry Rosser.

THE COURT: Very rapidly.

MR. TELANDER: Yes, Ma'am. I will do it as quickly as I can.

Your Honor, this is Defendant Mayer and Cie and Defendant Rothkopf's motion for final summary judgment.

This matter involves an instance that occurred back in 1975. There where three amended complaints in this matter, the third amended complaint naming the Defendant Mayer and Cie and Mayer Rothkopf Industries. When they were brought in, they moved for, and the service upon them was quashed by this

Court. That particular decision was taken to the Third District Court of Appeal, and Your Honor's position in that particular matter was affirmed back in 1980.

Our motion for summary judgment has, attached to it, a copy of both of these items. I know that you don't have the file, but anyway, this Court ruled, back in 1980, that there was never service of process ever perfected upon Mayer and Cie and Mayer and Rothkopf Industries.

In 1982, the fourth amended complaint was finally filed naming the same people as defendants. Now, in the same matter, a gentleman by the name of Eskenazi was a defendant. He was a defendant in the third amended complaint. They agreed to hold off on that matter until the appeal as to Mayer and Cie and Mayer and Rothkopf came down.

That appeal came down. The fourth amended complaint was filed, and Eskenazi filed his motion to dismiss, essentially on the same grounds we have; that is that the statute of limitations has run. It has run because this is a '75 accident, and service of process was never obtained over these defendants until 1982. I can really show the Court, which might—the Court's ruling on the Eskenazi matter, which sustained that position that there was no relation back, and that the statute of limitations have run. 16 through 21 sets out the Court's position in the argument made a couple of months ago on Eskenazi.

Essentially, what we are saying, Judge, is, there has never been service of process upon these people until 1982. In 1982, Your Honor had ruled, in this very

hearing, the service of process was finally perfected by the fourth amended complaint, but it did not relate back, and therefore, the statue of limitations had run.

Essentially, that is my argument. I can give you my copy of the motion, if you would like to look at it, since you don't have the file, but I think that's exactly what I stated.

I also have a copy, if Your Honor wants, of the order which was appealed.

MR. ROSSER: Judge, the rule as to relation back simply is that if you don't state a new cause of action, the theory of the case is not changed, but your amended pleading dates back to the date of the original pleading. The third amended complaint, well within the four years after the accident, named these defendants, and the theory against them never changed anything, and other products liability theories of these defendants.

The case was never flatly dismissed and thrown out of court. Obviously, if it had been, it wouldn't have been subject to further amendment. It would have been refiled. We don't have that case before the Court now.

Ever since Florida Statute 95.01 was repealed, 1955, if I'm correct, the only rule in Florida as to the commencement of a cause of action goes to the date of filing the complaint and does not bear at all on service of process.

The Florida Supreme Court said, in Florida 116 So.2d. 767, which is a 1960 case in the Florida Supreme

Court. The Third District Court of Appeals has followed that in Dibble v. Jensen, 129 So.2d. 162(a), in the District Court of Appeal. The Second District followed that in Friday v. Newman, 183 So.2d. 25. Again, the Second District followed in Pratt v. Durkop, D-U-R-K-O-P, 356 So.2d. 1278, which are basically going to, when does the statute toll for purposes of the statute, and that is when the case is filed and no other time. In fact, in the Pratt v. Durkop case, the case was filed, and no summons was issued at all on the last day of the statute. A year later, an amended complaint was filed, a summons served, and on that one, the Second District ruled it was timely under prior decisions in Klosenski v. Flaherty. For that reason, whatever happened to Eskenazi is unimportant before the Court today. The question is, does the—the third amended complaint, for purposes of the statute, and whether or not jurisdiction was established, summons was served, is completely immaterial in the State of Florida.

THE COURT: Excuse me for one second.

Anything further?

MR. TELANDER: Yes. If Your Honor would like to look at these five pages—

THE COURT: I'm familiar with that.

MR. TELANDER: This really is—

THE COURT: I just—

MR. TELANDER: It goes from 16 to 21. I think that's where it sets it out.

MR. ROSSER: If the Court would like, I could cite a couple statements on the—If you don't change cause of action, you change back to—

THE COURT: Those are the amendments. There are also a few on the—on partnerships and dropping and entering parties. The problem is, your complaint does not set up any jurisdiction for anybody, and that's what I said once before, and that's what I—I have not found anything to the contrary.

Your amendment that you are talking about is to add another count or to change the wrong name of a defendant who you had jurisdiction over, but I don't know whether or not, the way I read those cases that I cited before, and the cases that—that allow the relation back to doctrine, have anything to do with if you file a complaint that is improper jurisdictionally, and yours was improper jurisdictionally.

MR. ROSSER: But the theory of action hasn't changed. There aren't any changes, immediately reading what the Supreme Court said, that the date of filing of the cause of action being the most important thing and relations back, except as to filing a new theory of action. It hasn't changed, and they were properly named before the statute ran. At least Mayer and Cie, a German corporation, was named in the third amended complaint. Nobody is accusing them of anything before the statute ran, which it is negligent manufacture, so forth, so on.

THE COURT: That's true, but you can't file a lawsuit without any jurisdictional allegations and say it tolls the statute of limitations until you can figure out how to get service on somebody like that. You had

no jurisdictional allegations, and the Third District upheld it on that. Not that the service was bad, but that the complaint was jurisdictionally incorrect. All right? As far as service is concerned, they weren't interested in that because that burden shifted separately if you had a proper complaint. You did not have a proper jurisdictional complaint.

MR. ROSSER: But they did not say, nor has any case said that if your jurisdictional allegations are faulty, you can't relate back if you amend to state different jurisdictional facts, because you still haven't changed your cause of action.

There is a case, and I'm sure the Court is aware of it, because it is in the motion filed by these parties, where the party named originally was said to be the owner of the property. Later on, it turned out to be that the individual, not the corporation, was the owner of the property, and the Court said they were in there. He has been served, himself, personally, even though not as a named defendant. He has been litigating, and so you can't turn around now and say the statute has run. So for this purpose, allegations, this is jurisdictional allegations and not ownership. They have been in the case, litigating before the statute ran.

THE COURT: Well, Florida doesn't have special experiences, but it does say an attorney who represents an individual where there is no jurisdiction does not lend itself to the jurisdiction of the Court.

MR. ROSSER: We are not trying to establish jurisdiction. I'm talking about the statute of limitations,

and what the Court said was as long as they had the notice going on, they thought that militated toward a more liberal view. Naming the individual now as opposed to the corporation is sufficient. The statute hasn't run, whereas in the ordinary course of circumstances, if you amend to name a brand-new party after the statute ran, you are in trouble. If that is going to be the view, similarly, they had plenty of notice. Their name was down as party. All we're talking about is technical jurisdictional allegations.

If, under a complaint that you filed, somebody is not even amenable to service, or if they happen to be out of state, there are cases along that line, and I have got one of them down here.

THE COURT: Yes, but you already alleged jurisdiction. You have a jurisdictional complaint. Your complaint was dismissed three times for failure to allege jurisdiction.

MR. ROSSER: The third time it wasn't dismissed. Service was quashed. If we are dismissed on the third, we are out of the courthouse. We have to give 71.50 to the Clerk and then file again. There is no relation back, but we are not here on a refiled lawsuit. We are here on a fourth amended complaint on the same filing, same lawsuit, and that being the case, it doesn't partake of those cases that were cited by—

THE COURT: The fourth amended complaint?

MR. ROSSER: Mr. Eskenazi.

THE COURT: Let me see that decision one more time.

You are relating back to the fourth amended complaint, which is—

MR. ROSSER: We are on the fourth amended complaint.

THE COURT: The third amended is outside the statute, too, if I'm not mistaken.

MR. ROSSER: It seems to me the third complaint was filed December 13, 1978, which is well within four years of the accident.

Incidently, Judge, I think the language of the Third District, when it talks about the plaintiffs have similarly failed to sufficiently allege jurisdictional facts, that kind of language particularly lends itself to allowing someone to amend what they're alleging to attempt to conform to the statute, sufficient allegations seldom being viewed as a reason to kick someone out of court entirely if there is something they can say or the Court has already ruled that the amendment sufficiently states the facts.

THE COURT: Your fourth amended complaint is with January 22nd, '82?

MR. TELANDER: Yes, The accident was 1970.

THE COURT: '75.

MR. ROSSER: It was October 27, '75, and we are relating back, for purposes of this argument, to the third amended, which was December 13, '78.

THE COURT: Motion to Dismiss on basis of Summary Judgment is granted.

(Thereupon, the hearing was concluded.)

CERTIFICATE OF SHORTHAND REPORTER

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

I, VIRGINIA CROSBIE, do hereby certify that the case of Reuven Tako, et ux., plaintiffs, versus Mayer and Cie, et al., defendants, pending in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, At Law, No. 77-23642 CA 14, was heard before the Honorable Rhea Pincus Grossman, as Judge, on September 7, 1982; that I was authorized to and did report in shorthand the proceedings and evidence in said hearing; and that the foregoing pages, numbered from 1 to 11, inclusive, constitute a true and correct transcription of my shorthand report of the proceedings of said case.

IN WITNESS WHEREOF I have hereunto affixed my hand this 20th day of October, 1982.

/s/ Virginia Crosbie

My Commission expires: Sept. 1985

Appendix H

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

NO. 77-23642 CA 14

REUVEN TAKO and JACKIE TAKO, his wife,
Plaintiffs,

vs.

MAYER and CIE, a German corporation, and MAYER, ROTHKOPF INDUSTRIES, INC., a foreign corporation,
Defendants.

DEFENDANTS' MOTION FOR SUMMARY FINAL JUDGMENT

Defendants, MAYER and CIE, and MAYER, ROTHKOPF INDUSTRIES, INC., through their undersigned counsel, respectfully move the Court for entry of summary final judgment on their behalf and against the Plaintiffs, in conformity with Rule 1.510, Florida Rules of Civil Procedure, on the following grounds:

1. There is no genuine issue as to any material fact in this cause and the Defendants are entitled to summary final judgment as a matter of law.

2. These Defendants did not raise the statute of limitations as a ground for dismissal in their previously-filed Special Appearance, Motion to Quash and Motion to Dismiss Fourth Amended Complaint, which was heard before the Court on June 8, 1982, and were not, therefore, entitled to dismissal on that ground at that time.

2. On January 7, 1980, when this Court entered its Order, it was for the reason that, as to the Defendants, the Court concluded that jurisdiction had not been properly established on the basis of the Third Amended Complaint, and the present Plaintiffs appealed that decision to the District Court of Appeal of Florida, Third District.

3. On October 7, 1980, the District Court of Appeal, Third District, affirmed this Court as to all Defendants, and it is significant that, as of that date, more than four years had expired from the date of the accident which gave rise to the initial cause of action. Therefore, since no jurisdiction had attached as of that time, the statute of limitations had expired.

4. Notwithstanding the foregoing, Plaintiff's counsel did, on or about January 22, 1982, file the Fourth Amended Complaint against the same defendants. At the hearing on June 8, 1982, the Court made it clear and manifestly evident to Plaintiff's counsel that even though, by such Fourth Amended Complaint, jurisdiction would finally attach, nevertheless, the action as to the Defendant, Eskenazi, who had raised the defense of the statute of limitations by motion to dismiss, should be dismissed for the reason that the Fourth Amended Complaint demonstrated on its face that the action was barred by the applicable statute of limitations for an accident

9. In summary, then, as was expressed by this Court to Plaintiff's counsel in citing the cases of *Clark v. Realty Investment Center, Inc.*, 252 So.2d 589 (Fla.3d DCA 1971), and *Galuppi v. Viele*, 232 So.2d 408 (Fla.4th DCA 1970), at the time of the filing of the Fourth Amended Complaint, jurisdiction had not theretofore attached to any of the parties and there was an erroneous assumption by Plaintiff's counsel that the mere prior filing of an action would toll the statute of limitations. The cases cited by the Court make this clearly error, so that, when the Fourth Amended Complaint was filed, the statute of limitations had expired and there was no viable cause of action. As to these two Defendants, it is explicitly apparent that the statute of limitations had expired, inasmuch as it was the appeal by the Plaintiffs on the Order entered by this Court on this precise question that presented the answer as to the question of jurisdiction and pronounced finality to any question of involvement of these two Defendants.

WHEREFORE and upon the foregoing, Defendants move for entry of summary final judgment on their behalf.

WE HEREBY CERTIFY that a true copy of the foregoing was mailed to LAW OFFICES OF HENRY T. COURTNEY, Attorneys for Plaintiffs. Suite 1611 New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132, and JOE N. UNGER, P.A., Attorneys for Defendants, Suite 808 Concord Building, 66 West

Flagler Street, Miami, Florida 33130, tis 20th day of August, 1982.

LAW OFFICE OF
RICHARD M. WELSH, P.A.
Attorneys for Defendants
1492 South Miami Avenue
Miami, Florida 33130

Telephone (305) 373-6641

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1980

REUVEN TAKO and JACKIE TAKO,
his wife,

Appellants,

vs.

MAYER ROTHKOPF INDUSTRIES, INC.,
etc., et al.,

Appellees.

CASE NO. 80-245

Opinion filed October 7, 1980.

An Interlocutory Appeal from the Circuit Court for Dade County, Rhea P. Grossman, Judge.

Henry T. Courtney, for appellants.

Joe N. Unger; Richard M. Welsh & Associates, for appellees.

Before HUBBART, Chief Judge and NESBITT and PEARSON, DANIEL, JJ.

PER CURIAM.

This is an appeal by the Takos, the plaintiffs below, from a non-final order quashing service of process on Mayer Rothkopf Industries, Inc. and Mayer & Cie. We have jurisdiction. Fla.R. App.P. 9.130(3) (C) (i).

We affirm the order of the trial court upon a holding that (1) the plaintiffs, whose complaint, in pertinent part, alleged that the defectively manufactured machine which caused injury to Reuven Tako was *sold* by the defendant manufacturers/brokers to Reuven Tako's employer in 1972, obviously could not show that the machine was manufactured after July 1, 1973, the effective date of Section 48.193, Florida Statutes (1979), and otherwise failed to satisfy their burden to clearly show that the machine was manufactured after July 1, 1970, the effective date of the predecessor statute, Section 48.182, Florida Statutes (1971), so as to make either of these long-arm statutes authorizing service upon non-resident defendants applicable to the present case, *see Babcock v. Volkswagenwerk Aktiengesellschaft*, 371 So.2d 1100 (Fla. 3d DCA 1979); *Yachts v. Ray Richard, Inc.*, 347 So.2d 779 (Fla. 3d DCA 1977); *Joyce Bros. Storage & Van Co. v. Piechalak*, 343 So.2d 97 (Fla. 3d DCA 1977); *Griffis v. J. C. Penney Co., Inc.*, 333 So.2d 503 (Fla. 1st DCA 1976); (2) the plaintiffs have similarly failed to sufficiently allege jurisdictional facts to clearly justify service upon these defendants under Section 48.181, Florida Statutes (1979) (in effect since 1957), *see Electro Engineering Products Co., Inc. v. Lewis*, 352 So.2d 862 (Fla. 1977); *Elmex Corp. v. Atlantic Federal Savings and Loan Association of Ft. Lauderdale*, 325 So.2d 58 (Fla. 4th DCA 1976); (3) if, arguendo, the plaintiffs' pleading had been sufficient to make Section 48.181, Florida Statutes (1979), applicable *ab initio*, shifting

the burden to the defendants to show, by prima facie proof, its inapplicability, *Electro Engineering Products Co., Inv. v. Lewis, supra*, the defendants made the required showing which was not overcome by the plaintiffs.

Affirmed

Appendix J

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 77-23642 CA 14

REUVEN TAKO and JACKIE TAKO, his wife,

Plaintiffs,

-vs-

MAYER AND CIE, a German corporation, MAYER ROTHKOPF, INC., a foreign corporation, and IRVING ESKENAZI, a non-resident,

Defendants.

FOURTH AMENDED COMPLAINT

Plaintiffs sue Defendants and state:

1. This is an action for damages in excess of FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS.

2. At all times material hereto, Plaintiffs were and are residents and domiciliaries of Dade County, Florida.

3. At all times material hereto, Defendant, MAYER AND CIE, was and is a German corporation engaged in the design and/or manufacture and sale and/or servicing

of knitting machines which are sold, inter alia, in Florida to and for the use of residents of Florida.

4. That at all times material hereto Defendant, MAYER AND CIE, was and is a foreign corporation which did and does operate, conduct, engage in and carry on a business or business venture in the State of Florida.

5. At all times material hereto, Defendant, MAYER AND CIE, a foreign corporation, has maintained one or more offices or agencies in Florida. At all times material hereto, Defendant, MAYER AND CIE, a foreign corporation, did and does sell, consign, or lease by various means tangible personal property which was and is sold through brokers, jobbers, wholesalers or distributors to persons, corporations or firms in Florida.

6. At all times material hereto, Defendant, MAYER ROTHKOPF INDUSTRIES, INC., is and was a foreign corporation which does and did operate, conduct, engage in, and carry on a business or business venture in the State of Florida.

7. At all times material hereto, Defendant, MAYER ROTHKOPF INDUSTRIES, INC., a foreign corporation, has maintained one or more offices or agencies in Florida.

8. At all times material hereto, Defendant, MAYER ROTHKOPF INDUSTRIES, INC., a foreign corporation did and does sell, consign, or lease by various means tangible personal property which was and is sold through brokers, jobbers, wholesalers, or distributors to persons, firms or corporations in Florida.

9. At all times material hereto, Defendant, IRVING ESKENAZI, a non-resident, did operate, conduct, engage in and carry on a business or business venture in the State of Florida.

10. At all times material hereto, Defendant, IRVING ESKENAZI, a non-resident, did sell, consign, or lease by various means tangible personal property which was and is sold by himself or through brokers, jobbers, wholesalers or distributors to persons, firms or corporations in Florida.

11. At all times material hereto, Defendant, MAYER AND CIE, a foreign corporation, acting by itself or through an agent or agents committed one or more wrongful acts outside of Florida which caused injury, loss, and damage to the Plaintiffs, which injury, loss or damage occurred in Florida.

12. At all times material hereto, the Defendant, MAYER AND CIE, expected or should reasonably have expected the wrongful act(s) to have consequences in Florida.

13. Defendant, MAYER AND CIE, derived and derives substantial revenue from interstate or international commerce and from the State of Florida and such substantial revenue is derived from the sale of tangible personal property, both directly and through wholesalers and distributors, to persons and firms within the State of Florida.

14. At all times material hereto, Defendant, MAYER ROTHKOPF INDUSTRIES, INC., a foreign corporation, acting by itself or through an agent or

agents committed one or more wrongful acts outside of Florida which caused injury, loss, and damage to the Plaintiffs, which injury, loss or damage occurred in Florida.

15. At all times material hereto, the Defendant, MAYER ROTHKOPF INDUSTRIES, INC., expected or should reasonably have expected the wrongful act(s) to have consequences in Florida.

16. Defendant, MAYER ROTHKOPF INDUSTRIES, INC., derived and derives substantial revenue from interstate or international commerce and from the State of Florida and such substantial revenue is derived from the sale of tangible personal property, both directly and through wholesalers and distributors, to persons and firms within the State of Florida.

17. At all times material hereto, Defendant, IRVING ESKENAZI, derived substantial revenue from the sale of items of tangible personal property, directly and/or through wholesalers, distributors, or other representatives, to persons and firms within the State of Florida.

18. At all times material hereto, Defendant, MAYER ROTHKOPF INDUSTRIES, INC., or other Rothkopf companies which have merged into and/or with MAYER ROTHKOPF INDUSTRIES, INC., and for whose liabilities MAYER ROTHKOPF INDUSTRIES, INC. is liable, have acted as exclusive agents or exclusive distributors for MAYER AND CIE in the State of Florida.

19. Defendant, MAYER AND CIE and Defendant, MAYER ROTHKOPF INDUSTRIES, INC. and other Rothkopf companies which have merged into and/or with MAYOR ROTHKOPF INDUSTRIES, INC., and for whose liabilities MAYER ROTHKOPF INDUSTRIES, INC. is liable, have been active in the State of Florida in distributing and selling the MAYER AND CIE machinery.

20. At all times material hereto, Defendant, MAYER AND CIE utilized distributors and other outlets in the State of Florida for the sale of its knitting machinery.

21. At all times material hereto, Defendant, MAYER ROTHKOPF INDUSTRIES, INC., utilized distributors and other outlets in the State of Florida for the sale of this knitting machine.

22. Defendant, MAYER ROTHKOPF INDUSTRIES, INC. is the U.S. subsidiary of record of MAYER AND CIE of Germany.

23. The Defendant, MAYER AND CIE, is a German corporation engaged in the busines of designing and/or manufacturing and selling knitting machines into the normal stream of commerce, and also services such machines.

24. The Defendant, MAYER ROTHKOPF INDUSTRIES, INC., is a foreign corporation engaged in the busines of designing and/or manufacturing and selling knitting machines into the normal stream of commerce and also services such machines.

25. At all times material hereto, Defendant, MAYER AND CIE, and Defendant, MAYER ROTHKOPF INDUSTRIES, INC., and other Rothkopf companies which have merged into and/or with MAYER ROTHKOPF INDUSTRIES, INC. and for whose liabilities MAYER ROTHKOPF INDUSTRIES, INC. is liable, have sold and distributed MAYER AND CIE knitting machinery to the various knitting mills in the Greater Miami, Dade County, Florida area.

26. The knitting machines designed and/or manufactured and/or sold and/or serviced by Defendants, MAYER AND CIE and MAYER ROTHKOPF INDUSTRIES, INC. and sold by and through Defendant, IRVING ESKENAZI, were distributed by all Defendants for use by citizens of Florida.

27. The Defendant, IRVING ESKENAZI, sold and delivered knitting machines into the State of Florida and, in particular, sold and delivered a knitting machine involved in this case, which knitting machine caused injury to Plaintiffs.

28. The Defendant, MAYER AND CIE, sold and delivered knitting machines manufactured by itself into the State of Florida and in particular, manufactured, sold and delivered the knitting machine that has caused injury to the Plaintiffs.

29. The Defendant, MAYER ROTHKOPF INDUSTRIES, INC., sold and delivered knitting machines manufactured by itself into the State of Florida and, in particular, manufactured, sold and delivered or otherwise serviced the knitting machine that has caused injury to the Plaintiffs.

30. Service of Process is being made and effectuated pursuant to Florida Statute Section 48.181, and Florida Statute Section 48.182, the precurser to Florida Statute Section 48.193, and is additionally being made pursuant to the Convention on the Service Abroad of Judicial and Extra-Judicial Documents on Civil or Judicial Matters.

31. At all times material hereto, the knitting machine which caused the injury to the Plaintiffs, was used in the manner and purpose for which it was intended.

32. The knitting machine which caused the injury to the Plaintiffs was manufactured after July 1, 1970.

33. Said knitting machine was purchased by Irving Eskenazi and used by Tropical Knitting Mills in Dade County, Florida, on or about December 20, 1972.

34. Said knitting machine was purchased by Irving Eskenazi and used by Tropical Knitting Mills for its regular and ordinary business.

35. The defective knitting machine was purchased on or about December 20, 1972 as a result of an advertising campaign which was and is still being conducted in Florida, which campaign includes, but is not limited to advertisements in trade journals as well as personal solicitations by salespersons distributing brochures for MAYER AND CIE machinery as sold and/or manufactured by MAYER ROTHKOPF INDUSTRIES, INC.

36. The knitting machine which caused injury to the Plaintiffs was manufactured, assembled and/or designed by the Defendant, MAYER AND CIE and/or

MAYER ROTHKOPF INDUSTRIES, INC. and these Defendants were merchants with respect to goods of that kind.

COUNT I

NEGLIGENCE

37. The Plaintiffs reallege the foregoing and further allege:

38. The knitting machine which caused injury to the Plaintiffs was negligently designed, manufactured, or assembled.

39. On or about October 27, 1975, at the time of the accident involved herein, the said knitting machine had not been substantially or materially altered or changed from the form of its manufacture or sale, nor was it expected to be by the Defendants, and was in substantially the same condition that it was in when it left the possession of the Defendant.

40. At all times material hereto, the Defendants, and each or all of them, designed, manufactured, distributed and/or otherwise sold a product known and described as an OVJA knitting machine.

41. The Defendants, and each or all of them, knew or should have known of the defect in design, manufacture, or assembly.

42. On or about October 27, 1975 at the place of REUVEN TAKO's employment, Tropical Knitting Mills,

and was using the knitting machine in the proper and normal fashion and for its intended purpose at the time of the accident.

48. Defendants breached their implied warranty of merchandability which ran to Plaintiff, REUVEN TAKO, as a foreseeable user of the product.

49. As a direct and proximate result of the breach of implied warrabty by the Defendants, Plaintiff, REUVEN TAKO, sustained serious injuries, suffered impairment of his working ability, loss of capacity to enjoy life, suffered pain therefrom, physical handicap and has incurred medical expenses; his injuries are permanent in their nature and he will suffer such losses in the future.

WHEREFORE, the Plaintiff, REUVEN TAKO, demands compensation for his injuries.

COUNT III

STRICT LIABILITY

50. Plaintiffs reallege all the foregoing and further allege:

51. Defendants manufactured and/or sold into the stream of commerce an unreasonably dangerous knitting machine, which knitting machine was made unreasonably dangerous by a defect attributable to the Defendants, MAYER AND CIE and/or MAYER ROTHKOPF INDUSTRIES, INC.

52. The Defendants, and each or all of them, knew or in the exercise of reasonable care should have known, that a knitting machine not properly designed, tested, constructed, and manufactured, would be likely to cause an unreasonable risk of harm to users of the product while operating said products for the purpose and manner intended by the Defendants.

53. That the knitting machine as designed, manufactured, and sold contained a defect(s) such as to constitute an unreasonable risk of harm and injury to foreseeable users while operating the knitting machine in the manner and purpose for which the knitting machine was intended.

54. As a direct and proximate result of the negligence of the Defendants, the Plaintiff, REUVEN TAKO, was injured, suffered pain therefrom, his working ability was impaired, and he suffered loss of capacity to enjoy life; his injuries are permanent in their nature and he will continue to suffer such losses in the future.

WHEREFORE, the Plaintiff, REUVEN TAKO, demands compensation for his injuries.

COUNT IV

CLAIM OF JACKIE TAKO

55. Plaintiffs reallege the foregoing and further allege:

56. At all times material hereto, the Plaintiff, JACKIE TAKO, was the lawful wife of the Plaintiff, REUVEN TAKO, she has lost the comfort, protection,

society, services, consortium and attention of the Plaintiff, REUVEN TAKO.

WHEREFORE, the Plaintiffs, REUVEN TAKO and JACKIE TAKO, his wife, demand compensation for their injuries and demand trial by jury of all issues so triable.

LAW OFFICES OF
HENRY T. COURTNEY
Attorneys for Plaintiffs
Suite 1611, New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132
Telephone: (305) 358-1057/463-8862

By /s/ Henry T. Courtney
HENRY T. COURTNEY

Reuven TAKO and Jackie Tako, his wife,
Appellants.

v.

MAYER ROTHKOPF INDUSTRIES, INC., etc et al.,
Appellees.

No. 80-245,

District Court of Appeal of Florida,
Third District.

Oct. 7, 1980.

Plaintiffs brought products liability suit. The Circuit Court, Dade County, Ray P. Grossman, J., entered nonfinal order quashing service of process, and plaintiffs appealed. The District Court of Appeal held that plaintiffs' product liability complaint failed to clearly show that machine at issue was manufactured after the effective date of the two long-arm statutes invoked by plaintiffs, and therefore, service of process was properly quashed.

Affirmed.

1. Process—71, 158

Plaintiffs' product liability complaint failed to clearly show that machine at issue was manufactured after the effective date of the two long-arm statutes invoked by plaintiffs, and therefore, service of process was properly quashed. West's F.S.A. §48.193; F.S.1971, §48.182.

2. Process—71, 158

Plaintiffs in products liability suit failed to sufficiently allege jurisdictional facts so as to justify service upon defendant under statutes governing service on nonresidents engaging in business in state, and even if plaintiffs' pleading had been sufficient to make such statute applicable ab initio, defendants met their burden of showing, by prima facie proof, the inapplicability of the statute. West's F.S.A. §48.181.

Henry T. Courtney, Miami, for appellants.

Joe N. Unger, Richard M. Welsh & Associates, Miami, for appellees.

Before HUBBART, C. J., and NESBITT and DANIEL S. PEARSON, JJ.

PER CURIAM.

This is an appeal by the Takos, the plaintiffs below, from a non-final order quashing service of process on Mayer Rothkopf Industries, Inc. and Mayer & Cie. We have jurisdiction. Fla.R.App.P. 9.130(a)(3)(C)(i).

[1,2] We affirm the order of the trial court upon a holding that (1) the plaintiffs, whose complaint, in pertinent part, alleged that the defectively manufactured machine which caused injury to Reuven Tako was *sold* by the defendant manufacturers/brokers to Reuven Tako's employer in 1972, obviously could not show that the machine was manufactured after July 1, 1973, the effective date of Section 48.193, Florida Statutes (1979), and

otherwise failed to satisfy their burden to clearly show that the machine was manufactured after July 1, 1970, the effective date of the predecessor statute, Section 48.182, Florida Statutes (1971), so as to make either of these long-arm statutes authorizing service upon non-resident defendants applicable to the present case, *see Babcock v. Volkswagenwerk Aktiengesellschaft*, 371 So.2d 1100 (Fla. 3d DCA 1979); *Yachts v. Ray Richard, Inc.*, 347 So.2d 779 (Fla. 3d DCA 1977); *Joyce Bros. Storage & Van Co. v. Piechalak*, 343 So.2d 97 (Fla. 3d DCA 1977); *Griffis v. J. C. Penney Co., Inc.*, 333 So.2d 503 (Fla. 1st DCA 1976); (2) the plaintiffs have similarly failed to sufficiently allege jurisdictional facts to clearly justify service upon these defendants under Section 48.181. Florida Statutes (1979) (in effect since 1957), *see Electro Engineering Products Co., Inc. v. Lewis*, 352 So.2d 862 (Fla. 1977); *Elmex Corp. v. Atlantic Federal Savings and Loan Association of Ft. Lauderdale*, 325 So.2d 58 (Fla. 4th DCA 1976); (3) if, arguendo, the plaintiffs' pleading had been sufficient to make Section 48.181, Florida Statutes (1979), applicable *ab initio*, shifting the burden to the defendants to show, by prima facie proof, its inapplicability, *Electro Engineering Products Co., Inc. v. Lewis, supra*, the defendants made the required showing which was not overcome by the plaintiffs.

Affirmed.

Appendix L

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY.

CASE NO. 77-23642 CA-14

GENERAL JURISDICTION DIVISION

REUVEN TAKO, et al.,

Plaintiff,

vs.

MAYER, ROTHKOPF INDUSTRIES, INC. OF NEW YORK, etc., et al.,

Defendants.

ORDER ON MOTION TO QUASH SERVICE

THIS CAUSE came on to be heard before me upon Defendants' MAYER AND CIE, a German corporation, and MAYER ROTHKOF INDUSTRIES, INC., a Delaware corporation, Motion to Quash Service of Process. The Court, based upon the two exhibits in evidence for the purposes of this hearing; based on the present case law; the testimony of the two witnesses presented; the affidavits that are in the file; the allegations set forth in the Third Amended Complaint; the date of the incident; and based upon my finding that MAYER ROTHKOPF INDUSTRIES, INC., is not an agent of MAYER AND CIE, a German corporation, it is hereby,

ORDERED and ADJUDGED:

That the Motion to Quash Service of Process on behalf of Defendants, MAYER AND CIE, a German corporation, and MAYER ROTHKOPF INDUSTRIES, INC., be and the same is hereby granted and Service of Process is hereby quashed.

DONE and ORDERED in Chambers at Miami, Dade County, Florida, this 7 day of January, 1980.

RHEA PINCUS GROSSMAN
JUDGE, CIRCUIT COURT

Copies furnished to:
Law Offices of Henry T. Courtney
Attorneys for Plaintiffs

Richard M. Welsh & Associates, P.A.
Attorneys for Defendants.

A. Blackwell Stieglitz, Esquire

Appendix M

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY.

GENERAL JURISDICTION DIVISION

CASE NO. 77-23642 (Div. 14)

REUVEN TAKO and JACKIE TAKO, his wife,
Plaintiffs,

v.

MAYER ROTHKOPF INDUSTRIES, INC., a Delaware corporation; MAYER ROTHKOPF INDUSTRIES, INC., OF SOUTH CAROLINA; MAYER ROTHKOPF INDUSTRIES OF NEW YORK; MAYER AND CIE (USA), INC.; MAYER AND CIE, a German corporation; IRVING ESKENAZI; JOSEPH KOPELOWITZ; EASTERN CAPITAL CORPORATION; and INTERNATIONAL TEXTILES MACHINERY COMPANY, LTD., GREENSBORO, NORTH CAROLINA,
Defendants.

THIRD AMENDED COMPLAINT

The Plaintiffs, REUVEN TAKO and JACKIE TAKO, his wife, sue the Defendants, MAYER ROTHKOPF INDUSTRIES, INC., a Delaware corporation; MAYER ROTHKOPF INDUSTRIES, INC. OF SOUTH CAROLINA; MAYER ROTHKOPF INDUSTRIES OF NEW YORK; MAYER AND CIE (USA), INC.; MAYER

AND CIE, a German corporation; IRVING ESKENAZI; JOSEPH KOPELOWITZ; EASTERN CAPITAL CORPORATION; and INTERNATIONAL TEXTILES MACHINERY COMPANY, LTD., GREENSBORO, NORTH CAROLINA, and state:

COUNT I—NEGLIGENCE

1. This is an action for damages in excess of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00)

2. The Defendant, MAYER ROTHKOPF INDUSTRIES, INC., is a foreign corporation and is engaged in the business of selling and/or manufacturing knitting machines in the State of Florida for industrial textile use.

3. The Defendant, MAYER ROTHKOPF INDUSTRIES, INC. OF SOUTH CAROLINA is a foreign corporation engaged in the business of selling and/or manufacturing knitting machines in the State of Florida for industrial textile use, and is an agent of its principal MAYER ROTHKOPF INDUSTRIES OF NEW YORK.

4. The Defendant, MAYER ROTHKOPF INDUSTRIES, INC. OF NEW YORK, is a foreign corporation engaged in the business of selling and/or manufacturing knitting machines in the State of Florida for industrial textile use.

5. The Defendant, MAYER AND CIE (USA), INC. is a foreign corporation engaged in the business of selling and/or manufacturing knitting machines in the State of Florida for industrial textile use.

6. The Defendant, MAYER AND CIE is a German corporation engaged in the business of selling and/or manufacturing knitting machines in the State of Florida for industrial textile use.

7. The Defendant, INTERNATIONAL TEXTILES MACHINERY COMPANY, LTD., GREENSBORO, NORTH CAROLINA, is a foreign corporation and is engaged in the business of selling and/or manufacturing knitting machines in the State of Florida for industrial textile use.

8. The Defendant, EASTERN CAPITAL CORPORATION, is a corporation engaged in the sale of knitting machines in the State of Florida for industrial textile use.

9. The Defendants IRVING ESKENAZI and JOSEPH KOPELOWITZ, are engaged in the sale of knitting machines in the State of Florida for industrial textile use.

10. The Defendant, EASTERN CAPITAL CORPORATION, sold and delivered knitting machines in the State of Florida and in particular sold and delivered the knitting machine involved in this cause.

11. The Defendant IRVING ESKENAZI sold and delivered knitting machines in the State of Florida and in particular sold and delivered the knitting machine involved in this cause.

12. The Defendant JOSEPH KOPELOWITZ sold and delivered knitting machines in the State of Florida

and in particular sold and delivered the knitting machine involved in this cause.

13. The Defendant, MAYER ROTHKOPF INDUSTRIES, INC. sold, manufactured and delivered knitting machines in the State of Florida and in particular sold, manufactured and delivered the knitting machine which caused injury to the Plaintiff herein.

14. The Defendant MAYER ROTHKOPF INDUSTRIES, INC. OF SOUTH CAROLINA sold, manufactured and delivered knitting machines in the State of Florida and in particular sold, manufactured and delivered the knitting machine which caused the injury to the Plaintiff herein.

15. The Defendant, MAYER ROTHKOPF INDUSTRIES, INC. OF NEW YORK sold, manufactured and delivered knitting machines in the State of Florida and in particular sold, manufactured and delivered the knitting machine which caused the injury to the Plaintiff herein.

16. The Defendant MAYER AND CIE (USA), INC. sold, manufactured and delivered knitting machines in the State of Florida and in particular sold, manufactured and delivered the knitting machine which caused the injury to the Plaintiff herein.

17. The Defendant MAYER AND CIE, a German corporation, sold, manufactured and delivered knitting machines in the State of Florida and in particular sold, manufactured and delivered the knitting machine which caused the injury to the Plaintiff herein.

18. Service of process is being made and effectuated pursuant to Florida Statutes: F.S. §48.181 and F.S. §48.193. Service is being made in the alternative pursuant to both Statutes as to each Defendant based on the fact that each Defendant has:

a. engaged, operated, conducted or carried on a business in the State of Florida and therefore service will be made on the Secretary of State, and

b. each Defendant has caused injury to a person within the State arising out of an act or omission outside of this State, i.e., the manufacture of the product involved, which was manufactured by any or all of the Defendants alternatively and was used within this State in the ordinary course of commerce, trade or use, and the use or consumption resulted in the injury.

19. On or about December 20, 1972, the knitting machine involved herein was manufactured and/or sold and delivered to Tropical Knitting Mills, Inc., a Florida corporation, for adequate consideration by the Defendants, for use in Tropical Knitting Mills, Inc.'s knitting mill located at 2225 East 11th Avenue, Hialeah, Florida.

20. The sale of the aforesaid machine took place on or about December 20, 1972. The machine involved was manufactured by the Defendant, MAYER AND CIE, a German corporation and sold by and through and to IRVING ESKENAZI, JOSEPH KOPELOWITZ and EASTERN CAPITAL CORPORATION to Tropical Knitting Mills.

21. The sale of the aforesaid machine took place on or about December 20, 1972. The machine involved

Defendants were merchants with respect to goods of that kind.

27. Plaintiff, REUVEN TAKO was employed by Tropical Knitting Mills, Inc. and used the knitting machine manufactured and/or sold by the Defendants in the course of his employment.

28. The Defendant MAYER ROTHKOPF INDUSTRIES, INC. a Delaware corporation, was at all times material hereto a wholly owned and controlled subsidiary and/or agent of the Defendant MAYER AND CIE, a German corporation. The Defendant, MAYER ROTHKOPF INDUSTRIES, INC., a Delaw re corporation, is the alter ego of MAYER AND CIE, a German corporation, and vice-versa.

29. The Defendant MAYER ROTHKOPF INDUSTRIES, INC. OF SOUTH CAROLINA was at all times material hereto a wholly owned and controlled subsidiary and/or agent of the Defendant, MAYER AND CIE, a German corporation. The Defendant, MAYER ROTHKOPF INDUSTRIES, INC. OF SOUTH CAROLINA is the alter ego of MAYER AND CIE, a German corporation and vice-versa.

30. The Defendant MAYER ROTHKOPF INDUSTRIES, INC. OF NEW YORK, was at all times material hereto a wholly owned and controlled subsidiary and/or agent of the Defendant, MAYER AND CIE, a German corporation. The Defendant, MAYER ROTHKOPF INDUSTRIES, INC. OF NEW YORK is the alter ego of MAYER AND CIE, a German corporation and vice-versa.

31. The Defendant, MAYER AND CIE (USA), INC., was at all times material hereto a wholly owned and controlled subsidiary and/or agent of the Defendant, MAYER AND CIE, a German corporation. The Defendant, MAYER AND CIE (USA), INC. is the alter ego of MAYER AND CIE, a German corporation and vice-versa.

32. On or about October 27, 1975, at the time of the accident involved herein, the said knitting machine had not been substantially or materially altered or changed from the form of its manufacture or sale, nor was it expected to be by the Defendants, and was in substantially the same condition that it was in when it left the possession of the Defendants.

33. On or about October 27, 1975, at the place of Plaintiff, REUVEN TAKO's employment at Tropical Knitting Mills, Inc., Plaintiff, REUVEN TAKO, while operating said machine, injured his hand and arm.

34. The Defendants as designers, assemblers, manufacturers or sellers, were negligent and careless in the design, assembly, manufacture or sale of said knitting machine in the following manner:

a. Said knitting machine was of a careless, unsafe or unreasonably dangerous design in that it was so designed that fingers, hands, arms or other extremities could become caught in it and mangled and injured.

b. Failure to properly or adequately warn of this dangerous characteristic of said knitting machine.

c. Failure to install safety or protective devices which would prevent fingers, hands, arms, or other extremities from being caught in the said knitting machine.

d. Failure to adequately inspect or test the said machine so as to reveal the defect described herein so that proper warnings could be given and/or proper precautionary measures taken.

e. Failure to provide a proper guard or protective shield.

f. Failure to provide a mechanism that would automatically shut off the machine if someone should become caught in the machine.

g. Failure to install safety devices that would minimize injuries if someone were to become caught in the said machine.

35. The Defendants, as designers, assemblers, manufacturers, or sellers of said knitting machine knew or, in the exercise of reasonable care, should have known of the product's characteristics as alleged above in Paragraph 34.

36. As a direct and proximate result of the negligence of the Defendants, the Plaintiff REUVEN TAKO sustained serious injuries, suffered impairment of his working ability, loss of capacity to enjoy life, pain, suffering, mental anguish, physical handicap and incurred medical expenses; his injuries are permanent in their nature and he will continue to suffer such losses in the future.

WHEREFORE, the Plaintiff, REUVEN TAKO, demands compensation for his injuries.

COUNT II—IMPLIED WARRANTY

37. Plaintiffs reallege all the allegations of Paragraphs 1 through 36, and further allege:

38. At all times material to this action, the Defendants impliedly warranted that the said knitting machine was safe for proper use and maintenance and fit for the uses and maintenances intended, was of merchantable quality, carefully made and free of defects or dangers.

39. The Plaintiff, REUVEN TAKO, relied upon said implied warranty and was using the knitting machine in a proper and normal fashion at the time of the accident.

40. Said knitting machine was not as it was impliedly warranted to be in that it was defective and not fit for all uses and maintenance intended and was not of merchantable quality; said defect was present at the time said knitting machine was designed, constructed, assembled, manufactured or sold by the Defendants; accordingly, the Defendants breached their implied warranties of fitness and merchantability.

41. As a direct and proximate result of the breach of the implied warranties by the Defendants, Plaintiff, REUVEN TAKO, sustained serious injuries, suffered impairment of his working ability, loss of capacity to enjoy life, pain, suffering, mental anguish, physical handicap, and incurred medical expenses; his injuries

are permanent in their nature and he will continue to suffer such losses in the future.

WHEREFORE, Plaintiff, REUVEN TAKO, demands compensation for his injuries.

COUNT III—STRICT LIABILITY

42. Plaintiffs reallege all the allegations of Paragraphs 1 through 41, and further allege:

43. Said knitting machine was placed on the market by the Defendants with the knowledge that it would be used without inspection for defects and at the time of design, assembly, manufacture and sale was in an unreasonably dangerous condition and accordingly, the Defendants are strictly liable in tort to the Plaintiffs.

44. Said knitting machine was unreasonably dangerous because of its design, manufacture, lack of warnings and safety devices described in Paragraph 34 of this Third Amended Complaint.

45. As a direct and proximate result of the foregoing acts, the Plaintiff, REUVEN TAKO, sustained serious injuries, suffered impairment of his working ability, loss of capacity to enjoy life, pain, suffering, mental anguish, physical handicap and incurred medical expenses; his injuries are permanent in their nature and he will continue to suffer such losses in the future.

46. At all times material to this action, the Plaintiff JACKIE TAKO, was the lawful wife of the Plaintiff, REUVEN TAKO; she has lost the comfort, protection,

society, services, consortium and attention of the Plaintiff, REUVEN TAKO.

WHEREFORE, the Plaintiffs, REUVEN TAKO and JACKIE TAKO, his wife, sue the Defendants and demand judgment in an amount in excess of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00) plus interest and costs and demand trial by jury of all issues so triable as of right by a jury.

FREIDIN AND GOLDFARB, P.A.
Attorneys for Plaintiffs
Suite 2500
44 West Flagler Street
Miami, Florida 33130
Phone—374-6080

BY [illegible]
PHILIP FREIDIN

I HEREBY CERTIFY that a true and correct copy of the foregoing Third Amended Complaint was mailed this 13th day of December, 1978, to RICHARD WELSH, ESQ., 1492 South Miami Avenue, Miami, Florida 33130.

BY [illegible]
PHILIP FREIDIN

Office - Supreme Court, U.S.
FILED
JAN 16 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-983

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1983

REUVEN TAKO and JACKIE TAKO, his wife,

Petitioners,

vs.

MAYER AND CIE, a German Corporation,
and MAYER ROTHKOPF INDUSTRIES, INC.,
a foreign corporation,

Respondents,

On Writ of Certiorari to the District Court
Of Appeal of Florida for the Third District

BRIEF OF RESPONDENT

Law Offices of Joe N. Unger
606 Concord Building
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Miami, Florida 33130
(305) 374-5500

Counsel for Respondents

BRIEF IN OPPOSITION TO ACCEPTANCE OF JURISDICTION

A. QUESTION PRESENTED FOR REVIEW

Pursuant to Rule 34.2, United States Supreme Court Rules, it is respectfully submitted that the Question Presented for Review set forth in the Petition for Certiorari is inaccurate and insufficient to characterize the issue before the Court.

The threshold issue is whether the federal question which the petitioners claim is at issue was timely raised. The petitioners admit that the federal question was raised for the first time in their Motion for Rehearing of the decision entered by the District Court of Appeal of Florida, Third District. The District Court's decision is the subject of the Petition for Certiorari.

The petitioners recognize federal law is well settled that federal questions raised for the first time on motion for rehearing from the highest state appellate court are untimely. The petitioners claim, however, that

the District Court's decision "unexpectedly" gave rise to the federal question.

As discussed below, the record reveals that the issue before the District Court of Appeal was identical to that before the trial court. The decision of the District Court was a per curiam affirmance without opinion of the final summary judgment rendered by the trial court. The District Court's decision could not, therefore, unexpectedly give rise to any issue. Thus, the initial question before this Court is whether certiorari jurisdiction should be exercised to review asserted federal constitutional issues first raised on motion for rehearing in a state appellate court.

If this Court determines it is appropriate to proceed further, the second question presented is whether a cause in the procedural posture of the instant case is an appropriate subject for exercise of this Court's certiorari jurisdiction. The decision of the District Court of Appeal was without opinion. As such, it has no precedential value and does

not create conflict with decisions of any other court. A review by this Court will serve only to resolve the dispute between the parties. The question is whether a per curiam affirmance without opinion by a state appellate court in a civil case can be of sufficient importance to justify the exercise of this Court's certiorari jurisdiction.

If the Court finds it necessary to reach the merits, this cause presents one final question for review. The petitioners claim that their rights to equal protection and due process were violated by the unconstitutional application of the state rules of civil procedure. The rule in question deals with the relation back of amendments to the date of an original pleading.

The petitioners/plaintiffs sought to file a fourth amended complaint after the statute of limitations had run on the cause of action, arguing that this complaint should relate back to the date of filing of the third amended complaint, which had been filed prior to the

running of the statute. The trial court found that the fourth amended complaint did not relate back for purposes of tolling the statute of limitations because at no time prior to the running of the statute had the plaintiff alleged facts which could have brought the defendants within the jurisdiction of the court. The question, therefore, is whether under these facts, which are set forth in greater detail below, the decision of the District Court of Appeal affirming the trial court's grant of summary final judgment in favor of the defendants/respondents amounted to a denial of the petitioner's federal constitutional rights to due process and equal protection of the law.

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D. JURISDICTION

It is submitted that there is no violation of any title, right, privilege or immunity under the Constitution of the United States to warrant the exercise of this Court's certiorari jurisdiction pursuant to Title 28 U.S.C. § 1257(3).

E. STATEMENT OF THE CASE

The statement of the case set forth in the Petition for Certiorari omits the following facts. The respondents/defendants are non-resident foreign corporations. The petitioners attempted to serve their third amended complaint. Respondents' motion to quash service of process was granted by the trial court. (App. L.)[1] The petitioners appealed.

The District Court of Appeal of Florida, Third District, affirmed, holding that the complaint failed to allege the jurisdictional

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[1] The abbreviation "App." refers to the Appendix to the Petition for Certiorari. The abbreviation "R. App." refers to the Appendix to the Respondents' Brief.

facts necessary to bring the respondents within the purview of any of Florida's long-arm statutes. (App. K.) Subsequently, the petitioners filed a fourth amended complaint. (App. J.) It was not disputed that the fourth amended complaint was filed in excess of four years from the date of the accident which gave rise to the cause of action and, therefore, was not within the applicable statute of limitations. (Petition for Certiorari, p. 4.)

A hearing was held on the respondents' motion to dismiss and motion for summary judgment. (App. G.) It was the petitioners' position that the fourth amended complaint should relate back to the date of filing of the third amended complaint. The trial court found that the fourth amended complaint did not relate back because the third amended complaint did not allege jurisdiction over any of the defendants. (App. G.) Final summary judgment was entered for the defendants. (App. F.) The petitioners appealed. There was only one issue before the District Court

of Appeal stated as follows by the petitioners:

> "WHETHER THE DATE OF FILING AN AMENDED COMPLAINT, CONTAINING NO NEW THEORIES OF LIABILITY, RELATES BACK TO THE DATE OF FILING THE PRIOR COMPLAINT FOR PURPOSES OF THE STATUTE OF LIMITATIONS." (R, App. A.)

The issue was stated by the respondents as follows:

> "WHERE A COMPLAINT, FILED WITHIN THE LIMITATION PERIOD, CONTAINS NO JURISDICTIONAL ALLEGATIONS WHICH COULD BRING DEFENDANTS WITHIN THE JURISDICTION OF THE TRIAL COURT, THE STATUTE OF LIMITATIONS IS NOT TOLLED AND A SUBSEQUENT COMPLAINT WITH THE NECESSARY ALLEGATIONS FILED OUTSIDE THE PERIOD OF LIMITATIONS SHOULD BE DISMISSED." (R. App. A.)

The District Court of Appeal affirmed without opinion. (App. D.) The petitioners then sought review by this Court with the filing of the Petition for Certiorari.

F. SUMMARY OF ARGUMENT

Federal law is clear that a federal question raised for the first time in a motion for

rehearing in the highest state appellate court is untimely for purposes of this Court's jurisdiction. The petitioners claim that the District Court's decision unexpectedly gave rise to the federal question. The only issue before the District Court of Appeal was whether the fourth amended complaint related back to the filing of the third amended complaint so as to bring the fourth amended complaint within the statute of limitations. It is precisely the District Court's decision on this question which the petitioners claim is an unconstitutional application of the rule of procedure concerning the relation back of amendments. As this precise issue was clearly before both trial and appellate courts, petitioners claim that the decision was unexpected is totally without merit. Petitioners failed to timely raise a federal question, if one existed.

Secondly, this cause is not appropriate for the exercise of this Court's certiorari jurisdiction because the District Court's per

curiam affirmance is without precedential value. This Court's certiorari jurisdiction should be utilized to determine important federal questions which have wider application than the mere resolution of the dispute between two parties.

Thirdly, petitioners' constitutional entitlement to due process and equal protection was not violated by the District Court's decision. The third amended complaint did not toll the statute of limitations where that complaint contained no allegations which could ever bring the defendants within the personal jurisdiction of the trial court.

G. ARGUMENT

It has long been the established rule that a federal question raised for the first time after judgment in a petition for rehearing, after decision by the highest state court is untimely for purposes of this Court's jurisdiction unless the state court actually enter-

tains the question and decides it.[2] Herndon v. State of Georgia, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935); Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 1283 (1958).

The petitioners claim that they raised the federal question at the earliest opportunity, as the District Court's opinion unexpectedly gave rise to the constitutional issues. The petitioners cite Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) and State of Missouri v. Gehner, 281 U.S. 313, 50 S.Ct. 326, 74 L.Ed. 870 (1930), in support of their position that the federal question was timely raised. Those cases are distinguishable from the case at bar and do not apply here.

In Brinkerhoff-Farris, supra, a corporate

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[2] An order stating that a motion for rehearing has been considered and denied, as in the instant case (App. B.), is insufficient to show that the court entertained the asserted federal question. McCorquodale v. State of Texas, 211 U.S. 432, 29 S.Ct. 146, 53 L.Ed. 269.

taxpayer sought relief from an alleged discriminatory tax assessment by a county taxing authority. The taxpayer sought relief in equity claiming that an administrative remedy did not exist to provide a right to appeal to the county or state boards of equalization. The taxing authority claimed that the taxpayer was barred from equitable relief because it was guilty of laches in failing to pursue its legal remedies before the county and state boards of equalization.

The state supreme court agreed with the taxpayer that the state and county boards of equalization had no authority to grant the relief sought. The court, however, held that the taxpayer should have sought relief before the state tax commission. This holding expressly overruled prior decisions of the state supreme court which held that the state tax commission had no authority to grant the relief sought by the taxpayer. The court thus held that the taxpayer was barred from seeking relief in equity as it had failed to pursue

its legal remedies. The taxpayer then raised the federal question in a motion for rehearing.

This Court, in determining that the court's decision unexpectedly gave rise to the federal question, found that the possibility of relief before the tax commission was not suggested by anyone in the entire litigation until the state supreme court filed its opinion. It was then too late for the taxpayer to complain to the tax commission. Unlike Brinkerhoff-Farris, supra, where the relevant issue decided by the state court was never raised by any of the parties, the issue which petitioners now assert gives rise to a federal question was the only issue before the state trial and appellate courts. (R. App. A; App. G.) That petitioners did or did not assert deprivation of federal constitutional rights does not cure the untimeliness of doing so in the petition for rehearing.

The facts of State of Missouri v. Gehner, supra, may similarly be distinguished from the

facts of the case at bar. The subject of that litigation was a tax assessment on the property of an insurance company. In proceedings before an administrative body, it was determined that the company's United States bonds were not taxable. The administrative board completely eliminated the U.S. bonds from its calculation of the tax. The taxability of the bonds was not an issue between the parties when the case went to the state supreme court.

That court, however, held that a state statute required company liabilities to be charged against all assets, including the U.S. bonds, for purposes of calculating the tax. The taxpayer then raised, in a petition for rehearing, federal questions relating to the state's right to tax the bonds. As in Brinkerhoff, supra, the issue decided by the state court which gave rise to the federal question had not been raised by the parties to the litigation. In the instant case, whether the amended complaint related back to an

earlier pleading was the only issue raised by the parties. (R. App. A.)

The principle which allows this Court to entertain federal issues first raised in a motion for rehearing is not applicable to the instant case. The only thing in the District Court's per curiam affirmance which petitioners did not anticipate was that they did not prevail. The relation back issue was the only issue before the appellate court, as it had been before the trial court. (App. G; R. App. A.)

If losing is the only criteria for "unexpectedness", then every party who takes an appeal and receives an adverse decision would be entitled to raise federal issues and seek review in this Court. Such is obviously not the case.

Secondly, it is suggested that it would be inappropriate for this Court to exercise its discretionary jurisdiction to review a state appellate court's decision which is a per curiam afffirmance, without opinion, of the

trial court's order.

Florida law is clear that an appellate court decision with no written opinion has no precedential value. Further, citation to a decision without opinion has no relevance for any purpose and is properly excluded from a brief and oral argument. Department of Legal Affairs v. District Court of Appeal, Fifth District, 434 So.2d 310 (Fla. 1983):

> "As noted before, this was a per curiam opinion with no reasons or authorities given and, although this may be sufficient to support a plea of res judicata as between the original parties, such per curiam affirmance opinion does not stand for any general pronouncement of principles of law that might have been urged by the parties in their pleadings and briefs." Department of Legal Affairs, supra at 312, citing Acme Specialty Corp. v. City of Miami, 292 So.2d 379, 380 (Fla. 3d DCA 1974).

A federal circuit court has held that memorandum opinions do not come under the stare decisis rule. Jones v. Superintendent, Virginia State Farm, 465 F.2d 1091 (4th Cir. 1972).

The petitioners claim that their rights to due process and equal protection have been infringed upon by the unconstitutional interpretation and application of a Florida Rule of Civil Procedure. The application of the procedural rule to the facts of this case, even if incorrect, could not create a substantial federal question because the decision has no precedential value. The District Court's opinion cannot be utilized by other Florida courts in a determination of how the rule of procedure should be applied. Consequently, the substantive issue is of no import to the public at large.

This Court has long held that the exercise of its discretionary certiorari jurisdiction should be reserved for cases involving issues of great public importance. As stated in Layne and Bowler Corp. v. Western Wellworks, 261 U.S. 387, 43 S.Ct. 422, 67 L.Ed. 712 (1923):

> "If it be suggested that as much effort and time as we have given to the consideration of

> the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head." Layne and Bowler, supra at 43 S.Ct. 422.

See also, Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

The decision which is the subject of the Petition for Certiorari neither creates conflict with any other decision nor affects anyone but the civil litigants to this cause. As such, it fails to meet the rigid criteria this Court has historically exercised in determining which cases should be offered review by certiorari. As stated by Chief Justice Taft in Magnum Company v. Coty, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923):

> "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this court merely to give the defeated party. . .another hearing." Magnum, supra at 43 S.Ct. 532.

If the court should deem it necessary to reach the merits, the final question presented is whether the decision of the District Court of Appeal amounts to an unconstitutional application of Rule 1.190(c), Florida Rules of Civil Procedure. Petitioners admit that there are no Florida cases wherein the procedural rule has been applied to facts such as those which exists in the instant case. Inconsistently, the petitioners argue that the procedural rule was "unequally" applied to themselves. The petitioners' claim that they have been denied equal protection is totally unsubstantiated where they are unable to cite one decision in which the procedural rule was applied differently under similar facts.

The petitioners' claim that the order below denies them due process is equally without merit. Both the trial court and the District

Court of Appeal found that the third amended complaint contained no allegations which could have ever brought the defendants within the court's jurisdiction. The District Court of Appeal in its decision affirming the trial court's order quashing service of process of the third amended complaint found that the complaint failed to allege jurisdictional facts sufficient to justify service on the respondents/defendants under any of Florida's long-arm statutes. (App. K.) The Florida cases dealing with the relation back of amendments relied on by the petitioners in the Petition for Certiorari do not remotely approach these facts.

The facts at bar are analogous to a situation wherein the complaint does not present a factual basis for service by publication on a non-resident defendant. In those case, there is no jurisdiction to proceed in the case and, in effect, as to the non-resident defendants the cause of action is a nullity. See, Klosenski v. Flaherty, 116 So.2d 767 (Fla.

1959); and Clark v. Realty Investment Center, Inc., 252 So.2d 589 (Fla. 3d DCA 1971).

The petitioners argue that under federal case law interpreting Rule 15(c), Federal Rules of Civil Procedure, the amended complaint would clearly relate back to the prior pleading citing Burnstein v. Columbia Broadcasting System, Inc., 291 F.2d 8 (7th Cir. 1961). In Burnstein, supra, the plaintiff in his statement alleging diversity jurisdiction pled that he was a resident of Michigan and the defendant corporations were not incorporated in Michigan. The plaintiff failed to allege that Michigan was also not the principal place of business of the defendant corporations. The court found that the omission was a defective allegation of jurisdiction subject to amendment pursuant to 28 U.S.C. § 1653. The court's interpretation of 28 U.S.C. § 1653 coupled with Rule 15(c), Federal Rules of Civil Procedure, resulted in a ruling allowing the amendment curing the defective jurisdictional allegations to relate

back to the date of an earlier pleading.

Burnstein, supra, is not applicable to the instant case because, firstly, Florida has no statute or rule such as 28 U.S.C. § 1653 which specifically provides for the amendment of defective jurisdictional allegations. Secondly, the pleadings in the instant case do not contain a mere defective jurisdictional allegation. Rather, the trial court found:

> "THE COURT: Those are the amendments. There are also a few on the -- on partnerships and dropping and entering parties. Problem is, your complaint does not set up any jurisdiction for anybody, and that's what I said once before, and that's what I -- I have not found anything to the contrary.
>
> Your amendment that you're talking about is to add another count or to change the wrong name of a defendant who you had jurisdiction over, but I don't know whether or not, the way I read those cases that I cited before, and the cases that -- that allow the relation back to doctrine, have anything to do with if you file a complaint that is improper jurisdictionally, and yours was improper jurisdictionally.

* * *

> THE COURT: That's true, but you can't file a lawsuit without any jurisdictional allegations and say it tolls the statute of limitations until you can figure out how to get service on somebody like that. You had no jurisdictional allegations and the Third District upheld it on that. Not that the service was bad, but that the complaint was jurisdictionally incorrect." (App. G, 6-7, emphasis supplied.)

The petitioners also rely on Kane v. Central American Mining and Oil, Inc., 235 F.Supp. 559 (U.S.D. N.Y. 1964). Kane, supra, was a stockholder's derivative action against officers, directors, and the majority stockholders of the corporation. Certain defendants claimed that service upon them was invalid because they were not served with a second amended complaint which raised an additional count based upon federal subject matter of jurisdiction. The court held that the defendants were properly served with the first complaint and that as the second count arose out of the same basic facts as the first count there was no need for the defendants to be

served twice. This case has no relevance to the one at bar. The respondents in the instant case were never properly served and the petitioners never filed a complaint containing allegations under which the defendants could have been served, prior to the running of the statute of limitations.

It is submitted that a federal case more analogous to the facts of the instant one is Lillibridge v. Riley, 316 F.2d 232 (5th Cir. 1963). This was a medical malpractice action where jurisdiction was based on diversity of citizenship. Suit was brought within the applicable limitations period, but diversity of citizenship did not exist at that time. The action was dismissed on the motion of the defendant. After the statute of limitations had run, the plaintiff refiled the action alleging that diversity existed. The plaintiff relied on the Georgia "renewal statute" giving six months to refile a dismissed case. The second case was dismissed as barred by the statute of limitations. This second dismissal

was affirmed on a determination that in order for the renewal statute to prevent the operation of the statute of limitations, the first suit must have been one in which the court had jurisdiction over the parties and subject matter. See also, Osman v. Drashovich, 314 F.Supp. 1115 (E.D. Wisc. 1970).

These cases stand for the proposition that, as a general rule, in the absence of a renewal statute, the reinstitution of an action during the pendency of which the statute of limitations has run is not permitted. Significantly, Florida has no "renewal statute". Equally significant, when the third amended complaint was filed, within the period of the statute of limitations, the court neither had nor could obtain jurisdiction over the defendants.

This cause was, therefore, not "commenced" against the respondents when the third amended complaint was filed because there were no allegations necessary to acquire personal jurisdiction and the complaint could never

support service of process against them. To argue that filing a complaint against defendants who, under the allegations of the complaint, could never be brought within the personal jurisdiction of the court tolled the statute of limitations is without merit.

H. Conclusion

For the reasons and upon the authorities cited above, the Petition for Certiorari should be denied.

Respectfully submitted,

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I. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Brief of Respondent have been served upon Henry T. Courtney, Esquire, 1611 New World Tower, 100 North

Biscayne Boulevard, Miami, Florida 33132, by depositing in a United States post office or mailbox, with first-class postage prepaid, this 13th day of January, 1984.

Joe N. Unger

JOE N. UNGER

Respondents' Appendix A

CASE NO. 83-983

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1983

REUVEN TAKO and JACKIE TAKO, his wife,

Petitioners,

vs.

MAYER AND CIE, a German Corporation, and MAYER ROTHKOPF INDUSTRIES, INC., a foreign corporation,

Respondents,

Excerpt from Brief of Petitioners/Appellants:

> WHETHER THE DATE OF FILING AN AMENDED COMPLAINT, CONTAINING NO NEW THEORIES OF LIABILITY, RELATES BACK TO THE DATE OF FILING THE PRIOR COMPLAINT FOR PURPOSES OF THE STATUTE OF LIMITATIONS.

Excerpt from Brief of Respondents/Appellees:

> WHETHER A COMPLAINT, FILED WITHIN THE LIMITATION PERIOD, CONTAINS NO JURISDICTIONAL ALLEGATIONS WHICH COULD BRING DEFENDANTS WITHIN THE JURISDICTION OF THE TRIAL COURT, THE STATUTE OF LIMITATIONS IS NOT TOLLED AND A SUBSEQUENT COMPLAINT WITH THE NECESSARY ALLEGATIONS FILED OUTSIDE THE PERIOD OF LIMITATIONS SHOULD BE DISMISSED.

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No. 83-983

in the

Supreme Court

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United States

OCTOBER TERM, 1983

REUVEN TAKO and JACKIE TAKO, his wife,
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vs.

MAYER AND CIE, a German corporation,
and MAYER ROTHKOPF INDUSTRIES, INC.,
a foreign corporation

On Petition for Writ of Certiorari
To The District Court Of Appeal Of Florida
For The Third District

REPLY BRIEF OF PETITIONERS

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On Petition for Writ of Certiorari
To The District Court Of Appeal Of Florida
For The Third District

REPLY BRIEF OF PETITIONERS

1. The Federal Question Was Timely Raised.

Respondents suggest that two of the cases relied on by Petitioners, *Brinkerhoff-Farris Trust & Savings Co. vs. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107

(1930) and *Missouri ex rel Missouri Insurance Co. vs. Gehner*, 281 U.S. 313, 50 S.Ct. 326, 74 L.Ed. 870 (1930), are distinguishable from the instant case because the facts in those cases are different from the facts in the instant case. However, the *material* facts are indistinguishable—that all prior rulings by the same court were contrary to the rulings in those cases, and that therefore the Petitioners could not reasonably have anticipated the result. Therefore the application of the concepts of law espoused therein is proper.

Respondents have argued that merely because the issue of relation back of an amendment was clearly before both the trial and appellate courts, the decision of the District Court of Appeal could not have been unexpected and that therefore, raising the federal question on motion for rehearing was untimely.

Neither of the cases cited above so limit the exception set forth in those cases, as Respondents would have this Court believe. The controlling factor is not the nature of the issue before the state court prior to the unexpected ruling; rather, the controlling factor is whether the ruling should have been anticipated. Conspicuously absent in Respondents' brief is any comment regarding this Court's summation of the exception as stated in *Herndon vs. Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935).

Respondents have stated that "[t]he only thing in the District Court's per curium affirmance which Petitioners did not anticipate was that they did not prevail".[1] Whether Petitioners *did not* anticipate the

[1]Brief of Respondents at page 17.

decision and loss is irrelevant. Rather, under the exception permitted by the authorities cited, the controlling principal is whether the Petitioners *should have* reasonably or fairly anticipated the decision.

In the instant case, the District Court of Appeal in affirming the summary judgment against Petitioners, ruled in diametric opposition to its prior decisions as well as the decisions of the State Supreme Court, and even of the United States Supreme Court.[2] Certainly it cannot reasonably be said that Petitioners should have anticipated such an unprecedented ruling, and therefore the Federal question was timely raised.

2. **Jurisdiction Of This Court Is Proper.**

Mayer and Cie and Mayer Rothkopf Industries, Inc. brazenly suggest " . . . that it would be inappropriate for this court to exercise its discretionary jurisdiction to review a state appellate court's decision which is a per curium affirmance, without opinion, of the trial court's order."[3]

Throughout its history, this court, as in *Brinkerhoff-Faris Trust & Savings Co., supra*, has found certiorari jurisdiction proper to review state court decisions without written opinion. Notwithstanding this Court's time-honored practice, the only basis on which Respondents Mayer and Cie and Mayer Rothkopf Industries, Inc. claim that this case does not give rise to a substantial

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[2]See footnote 5 and cases cited at page 17 of the Petition for Writ of Certiorari.

[3]Brief of Respondents at 17, 18.

federal question is that it comes to this court from a decision without written opinion. Clearly, in light of this court's history of accepting certiorari jurisdiction on cases coming to it from decisions without written opinion, Respondents' position is untenable.

3. The Decision Of The District Court Of Appeal Unconsitutionally Denied Petitioners Equal Protection And Due Process.

Respondents suggest that merely because there are no Florida cases factually identical with the instant case, there can be no denial of equal protection. This is simply not true. There is but one rule of procedure in Florida regarding the relation back of amendments;[4] it is virtually identical to Federal Rule of Procedure 15(c). Those rules are broad and accordingly any type of amendment meeting the criteria of the rules, as in the instant case, relates back to the original pleading.

Respondents Mayer and Cie and Mayer Rothkopf Industries, Inc. make much of the jurisdictional allegations contained in the Third Amended Complaint.[5] The statement by Respondents that " . . . the District Court of Appeal found that the Third Amended Complaint contained no allegations which could have ever brought the Defendants within the court's jurisdiction"[6] is totally

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[4]Florida Rule of Civil Procedure 1.190(c).

[5]The Third Amended Complaint (at Appendix M of the Petition) is the original complaint for the purpose of this appeal, as set forth more fully in the Petition for Writ of Certiorari.

[6]Brief of Respondents at 21, 22.

false. The court did not say any such thing, as a review of the court's decision[7] will show.

Respondents would have this court believe that the Third Amended Complaint was lacking in some type of required jurisdictional allegation. In support of that contention, the Respondents, in addition to making the misstatement referred to above, have quoted the trial court during the hearing on Respondents' Motion for Summary Judgement, wherein the court stated "the problem is, your Complaint does not set up any jurisdiction for anybody, . . . ".[8]

Florida Rule of Civil Procedure 1.110, which dictates what allegations a complaint must contain, requires only one jurisdictional allegation, and that is only ". . . a short and plain statement of the grounds upon which the court's jurisdiction depends . . . ".[9] This requirement was met by paragraph one of the Third Amended Complaint.[10] That the trial court was under the mistaken impression that there were some jurisdictional allegations required and not contained in the Third Amended

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[7]Contained in Appendix K of the Petition for Writ of Certiorari.

[8]Brief of Respondents at 24; Appendix G at G-6 of the Appendix to the Petition for Writ of Certiorari.

[9]It is important to note that this required allegation pertains to the *court's* jurisdiction, and not personal jurisdiction over a defendant. Allegations to support personal jurisdiction are not required, although, if included, they may be helpful in resisting a motion to quash service of process.

[10]At Appendix M-2 of Appendix to Petition for Writ of Certiorari.

Complaint cannot support the decision of the District Court, nor can it support the contentions of Respondents.

Respondents cite two Florida cases, *Klosenski vs. Flaherty*, 116 So.2d 767 (Fla. 1959) and *Clark vs. Realty Investment Center, Inc.*, 252 So.2d 589 (Fla. 3d DCA 1971) in support of their position with regard to the merits. Respondents claim that "[t]he facts at bar are analogous to a situation wherein the Complaint does not present a factual basis for service by publication on a non-resident defendant. In those case (sic), there is no jurisdiction to proceed in the case and, in effect, as to the non-resident defendants the cause of action is a nullity."[11] Not only do neither of those cases anywhere state that a cause of action is a nullity where the Complaint does not present a factual basis for service by publication,[12] those cases in no way support Respondents' position.

Clark vs. Realty Investment Center, Inc., supra, in no way dealt with a statute of limitations issue. Rather, it merely stands for the unremarkable proposition that when service is attempted under a method different from that provided for by statute, service is properly quashed.

Klosenski vs. Flaherty, supra, at 769, 770, however, did deal with the statute of limitations issue. In that

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[11]Brief of Respondents at 22.

[12]Contrary to the intimations of Respondents, the defendant in *Klosenski* had not been served by publication. In the instant case the defendants were served by substituted service.

case the Florida Supreme Court recognized that ". . . the statute of limitations is tolled by the filing of the Complaint in a civil action." It is suggested that the ironical reliance by Respondents on this case, which is entirely contrary to their position, and instead fully supports Petitioner's position, underscores the frivolous position taken by Respondents.

Respondents claim that the most analogous case to the instant case is *Lillibridge vs. Riley*, 316 F.2d 232 (5th Cir. 1963) and cite as similar *Osman vs. Draskovich*, 314 F.Sup. 1115 (E.D. Wisc. 1970).

Those cases are clearly inapplicable to the instant case. This is because those cases deal with causes of action that had been *dismissed* thereby necessitating the reinstitution or refiling of a new lawsuit. Significantly, the instant case was never dismissed; only service of process was quashed. The filing of the Fourth Amended Complaint was in no manner a reinstitution of the action.

Respondents Mayer and Cie and Mayer Rothkopf Industries, Inc. have offered this court neither authority nor logic to support the decision of the District Court of Appeal. It is suggested that this is because the decision below cannot be so supported.

CONCLUSION

For the reasons and upon the authorities cited above and in the Petition for Writ of Certiorari, it is respectfully suggested that the Petition for Certiorari should be granted and it is prayed that the Writ of Certiorari be issued and the judgement below summarily reversed.

Respectfully submitted,

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February 1984